April 19 2-3497 Judge Davis
$20

Affirmed.
Jos Field to write

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 215.

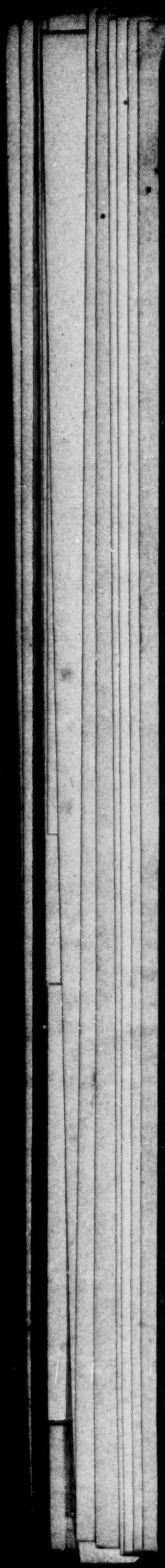
JOSEPH RECKENDORFER, APPELLANT.

VS.

EBERHARD FABER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 6, 1874.



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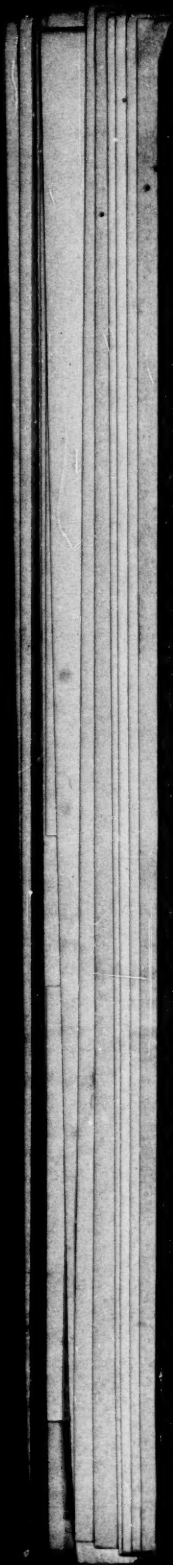

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1 [L. S.] The President of the United States of America to Eberhard Faber, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of August, A. D. 1872, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Joseph Reckendorfer, and to do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness Honl. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of New York, on the 1st day of July, in the year one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth,

KENNETH G. WHITE, *Clerk.*

KELLER & BLAKE,
Complt.'s Solrs.

The defendant is required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of August, 1872, or the bill will be taken pro confesso against him.

K. G. W., *Clerk.*

SOUTHERN DIST. OF NEW YORK, *ss:*

WILLIAM SCOTT, of lawful age, being duly sworn, says that he served the within writ on the within-named defendant personally on the 6th day of July, 1872, by delivering a true copy thereof to and leaving the same with him, at his place of business, No. 133 William st., in the city of New York, at the same time exhibiting to said defendant the within original writ.

WM. SCOTT.

Sworn to before me this 8th day of July, 1872.
[L. S.]

WM. H. BISHOP,
Notary Public, City of New York.

(Indorsed:) Served as per affidavit annexed.

GEO. H. SHARPE,
U. S. Marshal.

AUG. 6, '72.

I hereby depute Wm. Scott to execute the within writ.

GEORGE H. SHARPE,
U. S. Marshal.

JULY 1, '72.

Filed Augt. 6, '72.

1½ United States circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } Amended bill.

To the honorable the judges of said court:

Joseph Reckendorfer, of the city, county, and State of New York,

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To the honorable the judges of said court:

Joseph Reckendorfer, of the city, county, and State of New York,

and a citizen of said State, brings this his bill of complaint against Eberhard Faber, of the city, county, and State of New York, and a citizen of the said State. And thereupon your orator complains and says, that heretofore, and before the 30th day of March, A. D. 1858, one Hymen L. Lipman, of Philadelphia, in the State of Pennsylvania, was the original and first inventor or discoverer of a new and useful combination of a lead-pencil and eraser, which had not been known or used by others before the invention thereof by him; and that, being so as aforesaid the original and first inventor thereof, and being also a citizen of the United States, and desirous of acquiring an exclusive property in and to said invention, he made application in due form of law to
2 the Commissioner of Patents of the United States for letters-patent therefor, and complied in all respects with the requirements of the law in that behalf; and that thereupon, and after due proceedings had, the said Commissioner of Patents caused letters-patent to be made out in the name of the United States of America, in due form of law, and bearing date the 30th day of March, A. D. 1858, being signed by the Secretary of the Interior, and countersigned and sealed with the seal of the Patent-Office by the said Commissioner of Patents, whereby there was granted and secured unto the said Hymen L. Lipman, his heirs, administrators, or assigns, for the term of fourteen years from the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention; and the said letters-patent, having been duly recorded, were issued and delivered to him, the said Hymen L. Lipman.

And your orator further shows unto your honors that afterwards, and before the expiration of the term for which said letters-patent were granted, the said Hymen L. Lipman, being desirous of obtaining an extension or renewal of the said letters-patent beyond the term of limitation thereof, made application therefor in writing to the said Commissioner of Patents, setting forth the grounds therefor, pursuant to the acts of Congress of the United States in such case made and provided, and complied therein in all respects with the requirements of the said acts, and that thereupon, and after due proceedings had, the said commissioner granted an extension or renewal of said letters-patent for the further term of seven years from and after the expiration of the term for which the same was so granted and issued as aforesaid; that is to say, from and after the 30th day of March, A. D. 1872, and caused a certificate of such extension or renewal to be made out and endorsed upon said letters-patent, signed by him, the said Commissioner, and sealed with the seal of the Patent-Office, and bearing date the
3 25th day of March, A. D. 1872, whereby there was granted and secured unto the said Lipman, his heirs, administrators, or assigns, for the term of twenty-one years, from the 30th day of March, A. D. 1858, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention, as by reference to said letters-patent, with said certificate endorsed thereon, or to a duly-authenticated copy of the same here in court, ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that by an instrument in writing, under his hand and seal, duly executed, and bearing date the 30th day of March A. D. 1872, the said Hymen L. Lipman assigned, sold, transferred, and set over unto James H. Hoffman, of the city of New York, all his right, title, and interest in and to the said letters-patent so granted and extended as aforesaid, which said deed of assignment was duly recorded in the United States Patent-Office, and is now

remaining of record, as by reference to said deed, here in court, ready to be produced if required, will more fully and at large appear.

And your orator further shows unto your honors, that on the 16th day of May, A. D. 1872, the said James H. Hoffman duly executed and delivered to your orator a full and complete assignment of all his right, title, and interest in and to said letters-patent, so granted and extended as aforesaid, which said deed of assignment was duly recorded and is now remaining on record in the United States Patent-Office, as by reference to said deed, here in court, ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that heretofore, and before the 4th day of November, A. D. 1862, your orator was the original and first inventor of a certain new and useful improvement in pencils, which had not been known or used by others before the invention
4 or discovery thereof by him; and that, being so as aforesaid the original and first inventor thereof, and being also a citizen of the United States, and desirous of acquiring an exclusive property in said improvement, your orator made application in due form of law to the Commissioner of Patents of the United States for letters patent therefor, and, having fully and in all respects complied with all the requirements of the acts of Congress in such case made and provided, that thereupon, and after due proceedings had, the said Commissioner of Patents caused letters-patent to be made out in the name of the United States of America, in due form of law, and bearing date the 4th day of November, A. D. 1862, being signed by Caleb B. Smith, Secretary of the Interior, and countersigned and sealed with the seal of the Patent-Office by D. P. Holloway, Commissioner of Patents, whereby there was granted and secured unto your orator, his heirs, administrators, or assigns, for the term of seventeen years from the said 4th day of November, A. D. 1862, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention; and the said letters-patent, having been duly recorded, were issued and delivered to your orator.

And your orator further shows unto your honors, that afterwards, and before the 1st day of March, A. D. 1870, he presented a petition to the Commissioner of Patents alleging that the said letters-patent, so granted to him as aforesaid, were inoperative by reason of an insufficient or defective description or specification, which errors had risen from an inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, to the best of his knowledge and belief, and praying that the same might be canceled and new letters-patent issued to him on an amended specification therewith presented; and at the same time surrendered to him, the said Commissioner of Patents, the said original letters-patent; and your orator having fully and in all respects
5 complied with all the requirements of the statutes in such case made and provided, thereupon, and after due proceedings had, the Commissioner canceled said original letters-patent, and on the 1st day of March, A. D. 1870, caused new and amended letters-patent to be issued in lieu thereof, which said new and amended letters-patent are known and designated as re-issue No. 3863, are signed by W. T. Otto, Acting Secretary of the Interior, and countersigned and sealed with the seal of the Patent Office, by Samuel S. Fisher, Commissioner of Patents, and grant and secure unto your orator, his executors, administrators, or assigns, for the term of seventeen years from the 4th day of November, A. D. 1862, the full and exclusive right and liberty of making, using, and vending to others to be used, the said improvement in pencils—

a description whereof in the words of your orator is given in the schedule annexed to said re-issued letters-patent, and making part of the same, as by reference to said re-issued letters patent, or to a duly authenticated copy thereof here in court, ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that heretofore, and before the 4th day of June, A. D. 1872, one Teile Henry Müller, of Yonkers, in the State of New York, being the original and first inventor of a certain new and useful improvement in lead-pencils, which had not been known or used by others before the invention thereof by him, made application in due form of law to the Commissioner of Patents of the United States for letters-patent therefor; and the said Teile Henry Müller having fully and in all respects complied with the various requirements of the law in such case made and provided, that thereupon, and after due proceedings had, the said Commissioner caused letters-patent to be made out in the name of the United States of America, in due form of law, and bearing date the 4th day of June, A. D. 1872, being signed by the then Acting Secretary of the Interior, and countersigned and sealed with the seal of the Patent-Office by M. D.
6 Leggett, Commissioner of Patents, whereby there was granted and secured unto the said Tiele Henry Müller, his heirs or assigns, for the term of seventeen years from the said 4th day of June, A. D. 1872, the full and exclusive right to make, use, and vend the said invention—a description whereof in the words of said Müller is given in the schedule annexed to said letters-patent and making part of the same, as by reference to said letters-patent, or to a duly authenticated copy thereof, here in court, ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that before the granting and issuing of the said letters-patent to the said Teile Henry Müller, as aforesaid, the said Müller executed and delivered to your orator a full and complete assignment of all his right, title, and interest therein, and the invention and improvement described in and secured thereby, which said assignment is dated the 17th day of May, 1872, and was duly recorded in the United States Patent-Office, on the 5th day of June, 1872, as by reference to said deed of assignment, here in court ready to be produced, will more fully and at length appear.

And your orator further shows unto your honors, that he is now the sole and exclusive owner and holder of the three several before-recited letters-patent, and the inventions and improvements described and claimed therein; that since becoming the owner and holder thereof he has made and sold, and caused to be made and sold, and is still making and selling large quantities of lead-pencils, constructed according to the said several inventions, with profit to himself and benefit and advantage to the public; that the said inventions and improvements are of great utility and value, and that your orator verily believes that he will realize and receive large gains and profits therefrom if infringements thereof by the defendant above named and his confederates be prevented.

7 And your orator further shows unto your honors, that the said defendant, well knowing the premises, and the rights and privileges granted and secured unto your orator, as aforesaid, but contriving to injure your orator, and to deprive him of the profits, benefits, and advantages which might and otherwise would have accrued to him at New York City, in the State of New York, and without the license or permission, but against the will of your orator, has unlawfully and wrongfully

made or caused to be made and sold, or caused to be sold, and is now unlawfully and wrongfully making and selling large quantities of lead-pencils, containing and embracing and made according to said several inventions and improvements, which said unlawful making, use, and sale by said defendant, as aforesaid, is in violation and infringement of said several before-recited letters-patent and your orator's said exclusive rights and privileges under the same, and that the said defendant has derived and received, and is still deriving and receiving, from such unlawful manufacture and sale, great gains and profits, but to what amount your orator is ignorant, but your orator believes the same to be of the full sum of twenty-five thousand dollars, and so charges the fact to be, and prays that the said defendant may be required to make full disclosure of all such gains and profits.

And your orator in like manner alleges that the defendant, though requested to desist from such unlawful manufacture and sale, and to pay to your orator such gains and profits as the said defendant has actually made, has refused, and still refuses so to do; by means whereof, your orator is greatly injured, and is deprived and prevented from receiving the gains and profits to which he is lawfully entitled from the exclusive rights and privileges so granted, secured, and conveyed unto him, as aforesaid, and which he would derive and acquire but for the said unlawful acts of the said defendant.

Which said actings and doings of the said defendant are con-
8 trary to equity and good conscience, and tend to the manifest injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters and things of this sort are made cognizable by statute, to the end, therefore, that said defendant may, if he can, show cause why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the matters and things hereinbefore stated and charged; and that said defendant may answer the premises, and that he may be decreed to account with and pay over to your orator the profits which he has realized, as well as the damages suffered by your orator, from or by reason of such unlawful manufacture, use, and sale of said several inventions, or any or either of them:

May it please your honors, the premises considered, to grant unto your orator the writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, enjoining and restraining the said defendant, Eberhard Faber, his attorneys, clerks, servants, agents, and workmen, from making and selling, or causing to be made and sold, any lead-pencils constructed substantially according to the several inventions described in and secured by the several before-recited letters-patent or any or either of them. And also that the *suit* of preliminary or provisional injunction may issue, so restraining the said defendant, his agents, or employees, pending this suit. And that the said defendant may be decreed to pay the cost of this suit, and that your orator may have such other and further relief as the equity of the case may require, and as to your honors may seem meet.

And may it please your honors to grant unto your orator not
9 only the writs of injunction conformable to the prayer of this bill, but also the writ of subpœna ad respondendum, directed to the said defendant, commanding him on a day certain, therein to be named, to be and appear in this honorable court, and make answer unto this

bill of complaint, and to perform and abide such further order, direction, and decree as may be made against him.

And your orator will ever pray, &c.

JOSEPH RECKENDORFER,
By ISAAC HIRSCH,
Attorney.

KELLER & BLAKE,
Solicitors, and of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

ISAAC HIRSCH, being duly sworn, deposes and says that he is the duly-appointed attorney of Joseph Reckendorfer, the complainant in the foregoing bill named; that he has read said bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to those matters he verily believes it to be true.

ISAAC HIRSCH.

Sworn to before me this 26th day of August, A. D. 1872.
[SEAL.]
WM. H. BISHOP,
Notary Public, City of New York.

10 Circuit court of the United States for the southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.
} In equity.

The answer of Eberhard Faber, defendant, to the amended bill of complaint exhibited against him by the above-named complainant, Joseph Reckendorfer.

This respondent, now and at all times hereafter, saving and reserving to himself all and all manner of benefit and exception which may be had *as* taken to the manifold errors, uncertainties, imperfections, and insufficiencies of the said bill of complaint, for answer thereto, or to so much thereof as he is advised it is material or necessary for him to make answer unto, answering, says:

That, upon information and belief alone, he admits that letters-patent of the United States were issued to Hymen L. Lipman for a "Combination of a Lead-Pencil and Eraser," dated the thirtieth day of March, 1858; but whether the said patent was issued in accordance with the then existing laws of Congress, respondent is not informed, save by the said bill of complaint, but he denies that the said Hymen L. Lipman was the first and original inventor or discoverer of the said "Combination of a Lead-Pencil and Eraser."

That, upon information and belief alone, he admits that an extension or renewal of said letters-patent was granted for the further term
11 of seven years from and after the expiration of the term for which the same were granted and issued; that is to say, from and after the thirtieth day of March, 1872, the certificate whereof bears date the twenty-fifth day of March, 1872; but whether the said extension or renewal and the certificate thereof were granted and issued in accordance with the laws of Congress respondent is not informed, save by the said bill of complaint.

This respondent, further answering, says that he is not advised, save by the said bill of complaint, whether the said letters-patent so granted and extended were assigned by said Hymen L. Lipman to James H. Hoffman, and by said James H. Hoffman to the complainant, as set forth in the said bill of complaint, or otherwise, or whether said alleged assignments, or either of them, were duly or at all recorded in the Patent-Office, and he leaves the complainant to make such proof thereof as he may be advised.

This respondent further admits, upon information and belief alone, that letters-patent of the United States were issued to the complainant, Joseph Reckendorfer, dated the fourth day of November, 1862, for an alleged "improvement in pencils," but whether the said patent was issued in accordance with the then existing laws of Congress respondent is not informed, save by the said bill of complaint; but he denies that the said Joseph Reckendorfer was the original and first inventor of the said alleged "improvement in pencils."

This respondent denies that said original letters-patent issued to said Joseph Reckendorfer, hereinbefore referred to, were inoperative by reason of an insufficient or defective description or specification, or for any other reason, or that said original patent was in any degree inoperative by reason of any inadvertence, accident, or mistake, or that said re-issue thereof, set forth in said bill of complaint, was for good and lawful cause, or that the same was legal or valid for any purpose whatsoever, or that the re-issued letters-patent were for the same invention as was originally patented or attempted to be patented by said Joseph Reckendorfer, or that the said Joseph Reckendorfer was the original or first inventor of the invention described and claimed in said re-issued letters-patent; but, on the contrary, this respondent avers that said re-issue was obtained for the purpose of including therein improvements and inventions not shown or described in the original application of said Joseph Reckendorfer, or in the models or drawings, or in any matters or things accompanying the same; and that the inventions or improvements intended or attempted to be patented in and by said re-issued letters-patent, were not the invention of the said Joseph Reckendorfer, but were intended or attempted to be patented for the purpose of introducing ambiguous claims, by means of which to terrify timid people, and which would be, or seem to be, capable of being construed as the exigency of any particular case might suggest or seem to render advantageous to the complainant, and of suppressing or appropriating the inventions of other persons.

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This respondent further admits, upon information and belief alone, that letters-patent of the United States were issued to Teile Henry Muller, dated the fourth day of June, A. D. 1872, for an alleged "improvement in lead-pencils," but whether the said patent was issued in accordance with the then existing laws of Congress respondent is not informed, save by the said bill of complaint, but he denies that said Teile Henry Muller was the first and original inventor of the said alleged "improvement in lead-pencils."

This respondent, further answering, says that he is not advised, save by the said bill of complaint, whether the said letters-patent so granted to the said Teile Henry Muller were assigned by the said Teile Henry Muller to the complainant, the said Joseph Reckendorfer, as set forth in the said bill of complaint, or otherwise, or whether said alleged assignment was duly or at all recorded in the Patent-Office, and he leaves the complainant to make such proof thereof as he may be advised.

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And this respondent, further answering, denies that he has ever at all or in any way infringed upon the aforesaid letters-patent, or any or either of them, or that he is now infringing upon the same, or intends so to do, either by making, using, or vending to others to be used, or otherwise, the said inventions, as alleged in said bill of complaint, or otherwise.

And this respondent, further answering, says that he is advised, and therefore avers, that said letters-patent, and each and every part thereof, are void and of no effect in law; because that, for the purpose of deceiving the public, the descriptions and specifications filed by the said patentees in the Patent-Office were made to contain less than the whole truth relative to the several inventions or discoveries, or more than is necessary to produce the desired effects.

And this respondent, further answering, says that the said letters-patent, and each and every part thereof, are void and of no effect in law, because that the said alleged inventors and patentees were not, nor was either of them, the original and first inventors or discoverers of any material or substantial part of the said alleged invention or discovery, but that the same and every material and substantial part thereof had been previously known to and used by the following persons, in this country; that is to say, Joshua Gray, of Medford; George B. Sargent, of Melrose; John Ray, Joseph M. Wightman, Horace G. Tucker, Ebenezer Clapp, and James Alfred Page, of Boston, all in the State of Massachusetts; Joseph H. Adams and Charles Everett, both of the city of Washington, in the District of Columbia; Joseph T. Mears, of Philadelphia, in the State of Pennsylvania; Eberhard Faber, of Port Richmond, Staten Island; William K. Evans, William S. Rider, Anne Maria Rider, Emory Rider, Harry Joraleman, Philip Hufeland, Theodore Hoer,
14 John Schlamp, Otto Erler, Jacob Dursheid, Philip Neusel, Henry Winter, Henry Kneip, and Philip Schrag, all of the city of New York, and Charles T. Grotjan and Henry Ropes of Brooklyn, all in the State of New York; Daniel F. Pond, of New Haven, in the State of Connecticut; George W. Dickson, of Bergen Hill, Hudson, in the State of New Jersey; H. Neidecken, and Strickland & Company, both of Milwaukee, in the State of Wisconsin; Gladding & Brother, of Providence, in the State of Rhode Island; George A. Oates, of Augusta, in the State of Georgia; and Maxwell and Company, of Louisville, in the State of Kentucky.

And this respondent, further answering, says that the said letters-patent, and each and every part thereof, are void and of no effect in law because that the said invention had been in public use and on sale in this country for more than two years prior to the said inventor's and patentee's applications for said patents therefor, to wit, by Joseph H. Adams and Charles Everett, both of Washington, in the District of Columbia, at said Washington, and elsewhere; Horace G. Tucker and James Alfred Page, both of Boston, in the State of Massachusetts, at said Boston and elsewhere; Joseph T. Mears, of Philadelphia, in the State of Pennsylvania, and elsewhere; Eberhard Faber, of Port Richmond, Staten Island; William K. Evans and Harry Joraleman, of the city of New York, and Henry Ropes, of Brooklyn, all in the Sate of New York, and George W. Dickson of Bergen Hill, Hudson, in the State of New Jersey, at said city of New York, and elsewhere; H. Niedecken and Strickland & Company, both of Milwaukee, in the State of Wisconsin, at said Milwaukee, and elsewhere; Gladding & Brother of Providence, in the State of Rhode Island, at said Providence, and elsewhere; George A. Oates, of Augusta, in the State of Georgia, at said Augusta, and

elsewhere; Maxwell & Company, of Louisville, in the State of Kentucky, at said Louisville, and elsewhere.

15 And this respondent denies all and all manner of unlawful combination or confederacy by the said bill of complaint charged, and prays the same advantage of his aforesaid answer as if he had pleaded the several matters and things aforesaid to the bill of complaint herein, without this, that there is any other matter, cause, or thing in the said bill of complaint contained, material or necessary to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the knowledge or belief of this respondent.

All which matters and things this respondent is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN S. WASHBURN,
Respondent's Solicitor.

JOHN S. WASHBURN,
Counsel.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

On this fifth day of October, 1872, before me personally came Eberhard Faber, the above-named respondent, who, being by me duly sworn, did depose and say, that he has read the foregoing answer, and that the same is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

EBERHARD FABER.

Subscribed and sworn to before me this fifth day of October, 1872.
[L. S.] FREDK. W. REBHAUN,
Notary Public, County of New York.

16 Circuit court of the United States for the southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The replication of Joseph Reckendorfer, complainant, to the answer of Eberhard Faber, defendant.

The repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by his said bill he has already prayed.

KELLER & BLAKE,
Complt's. Solrs.

17 United States circuit court for the southern district of New York.

JOSEPH RECKENDORFER
against
EBERHARD FABER. } In equity.

SIR: Please take notice that an examination of witnesses on the part of complainant in the above-entitled cause will be had on Wednesday next, the 13th inst., at our office, No. 16 Murray street, in this city, and before some competent authority.

The examination will commence at three o'clock p.m., and be adjourned from time to time as deemed expedient.

Dated November 12th, 1872.

Yours, &c.,

KELLER & BLAKE,
Solrs. for Complts.

To JOHN S. WASHBURN, Esq., 132 *Nassau Street.*

18 United States circuit court, southern district of New York.

JOSEPH RECKENDORFER
against
EBERHARD FABER. } In equity.

Proofs for final hearing in the above-entitled cause, on the part of the complainant, taken before me, Edward G. Thompson, one of the standing examiners of this court, pursuant to the foregoing and annexed notice and proof of service thereof.

NEW YORK, *November* 13, 1873—3 p. m.

Present: E. Wetmore, esq., A. Pollock, esq., and C. M. Keller, esq., of counsel for complainant; John S. Washburn, esq., of counsel for defendant.

(Counsel for defendant objects to all the proofs to be taken herein on the part of the complainant, on the ground of multifariousness of the bill in embracing three separate patents in one suit, unless it shall be shown that the lead-pencils alleged to have been made and sold by the defendant in infringement thereof infringe, all of said several patents, and contain the improvements embraced in all aforesaid several patents.)

ALEXANDER HOMBERGER, a witness produced on the part of
19 the complainant, having been by me first duly cautioned and sworn, in answer to interrogatories propounded by counsel for complainant, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Alexander Homberger; I am 23 years of age; I reside at No. 325 East 52d street, New York City; I am a merchant.

Q. 2. Do you know Mr. Reckendorfer or Mr. Faber, the parties to this action?

A. No, sir; neither of them.

Q. 3. Do you know Mr. Faber's place of business in this city?

A. Yes, sir.

Q. 4. Have you made a purchase of pencils at that establishment; if so, will you please state when, and what pencils you purchased?

A. I did, on the 28th of May, 1872, I think. I produce a bill of such purchase. I am positive of the date being the 28th of May, 1872.

(Complainant's counsel offers in evidence the bill produced by the witness, marked "Complainant's exhibit No. 1, E. G. T., Exr.")

(Counsel for defendant objects to the exhibit, on the ground that the said bill is made out to, and purports to be a purchase by, "Mr. E. S. Dryden," and not by this witness; nor does this witness appear to be identified with it in any way.

And also objects on the ground of want of identity between the articles purporting to be described in the exhibit and the invention set forth in the letters-patent set forth in the bill of complaint.)

Q. 5. What did you do with the pencils so purchased by you?

20 A. I delivered them to Mr. Joseph Illfelder.

Q. 6. Did you deliver to Mr. Illfelder all the pencils mentioned in complainant's exhibit No. 1?

A. Yes, sir; all of them.

Q. 7. When did you deliver them to Mr. Illfelder?

A. The same day that I received them.

Q. 8. At the time when you made the purchase of pencils mentioned in complainant's exhibit No. 1, did you obtain any, and, if so what, samples of other sorts of pencils at the same place?

A. I obtained, a few days afterwards, the samples that I now produce.

(Samples marked "Complainant's exhibit No. 2, E. G. T., Exr.," and offered in evidence by counsel for complainant.)

(Counsel for defendant objects to said exhibits, on the ground of want of identity between said pencils and the inventions described in the letters-patent set forth in the complaint.)

Q. 9. What statement, if any, was made by the party from whom you obtained the samples at Mr. Faber's establishment with regard to taking an order for the same?

A. Of those pencils, complainant's exhibit No. 2, he had none on hand at the time. I asked him the price, which he said was $5.50 per gross.

And being cross-examined by John S. Washburn, esq., of counsel for defendant, says:

X Q. 10. At whose request did you make such purchase?

A. At the request of Mr. Hirsch and Mr. Joseph Illfelder.

X Q. 11. Who is Joseph Illfelder?

A. A gentleman, as far as I know, connected with the Eagle Pencil Company and with Joseph Reckendorfer.

X Q. 12. Where did your firm choose these pencils?

21 A. At the store of Mr. E. Faber, No. 133 William street, New York.

X Q. 13. Do you know of whom?

A. I don't know his name, but could identify him if I saw him.

Redirect examination:

Redirect Q. 14. Who is Mr. E. S. Dryden?

A. My partner in business.

ALEXANDER HOMBERGER.

Subscribed and sworn to before me this 13th day of November, A. D. 1872.

E. G. THOMPSON,
Examiner.

Examination of witnesses adjourned by consent of counsel for both parties to new notice.

U. S. circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

NEW YORK, *November* 21*st*, 1872—2 o'clock p. m.

Met pursuant to new notice.

Present, counsel for both parties.

22 JOSEPH ILLFELDER, a witness on the part of the complainant, being called and duly sworn, in answer to interrogatories propounded by counsel for complainant says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Joseph Illfelder; I am 24 years of age; I reside in Yonkers, New York State; I am a manufacturer of lead-pencils.

Q. 2. Do you know Mr. Alexander Homberger, residing in the city of New York?

A. I do.

Q. 3. Did he ever deliver to you any lead-pencils? and, if yea, state the date of such delivery, so near as you can remember.

A. He did, about the end of May, 1872.

Q. 4. Did he exhibit to you at that time a bill for such pencils?

A. He did.

Q. 5. Did Mr. Homberger ever deliver to you any other pencils, at any other time, than those you have referred in your answer to interrogatory 3?

A. He delivered to me some single pencils—samples of straight rubber-inserted paper-tube pencils—a few days later.

Q. 5. Can you produce the pencils so delivered to you by Mr. Homberger?

(Counsel for defendant objects, unless the said pencils are shown to have been sold by or procured from the defendant.)

A. No.

Q. 7. Please look at the packages of pencils here produced, and state whether or not those are the pencils delivered to you by Mr. Homberger, and the bill for which was given to you at the same time.

A. I did look at the pencils, and recognize them as the same package of pencils delivered to me by Mr. Homberger, and I received a bill for them at the same time.

23 Q. 8. Except these packages of pencils and the samples of which you have spoken, did you ever receive any other packages of pencils from Mr. Homberger?

A. I did not.

Q. 9. Please look at the complainant's exhibit No. 1, and state whether or not that is the bill to which you have referred to in the previous part of your examination?

A. It is.

Q. 10. Please look at the pencils, complainant's exhibit No. 2, and state what pencils they are?

A. They are those rubber-inserted pencils which I received from Mr. Homberger a few days later.

Q. 11. Will you please select from the packages of pencils here produced samples of each kind of rubber-inserted pencils contained in said packages?

A. I do so, and these are the pencils.

(Plaintiff's counsel offers in evidence pencils marked, respectively, "Complainant's exhibits No. 3 and No. 4.")

(Counsel for defendant objects to said exhibits, on the ground of want of identity between said pencils and the inventions described in the letters-patent set forth in the bill.)

And being cross-examined by counsel for the defendant:

X Q. 12. Is there any business connection, and if so what, between you and the complainant, Joseph Reckendorfer?

A. Mr. Joseph Reckendorfer is the resident partner of the Eagle Pencil Company, whose manufacturing business I attend to, assisting the superintendent thereof from time to time.

X Q. 13. In stating, in your answer to question 10, that complainant's exhibit No. 2 is those rubber-inserted pencils which you received from Mr. Homberger, how do you identify them as the same?

24 A. Because I never received any others of those from Mr. Homberger.

X Q. 14. How do you know that those are the same ones that you received from him?

A. I delivered them to Mr. Hirsch, who kept them in a separate place.

X Q. 15. Question repeated.

A. I recognized these pencils as the ones I delivered to Mr. Hirsch. As to my knowledge, he had no others.

X Q. 16. Are there any special identifying marks upon those pencils, which identify them as the ones you delivered to Mr. Hirsch; and, if so, what are they different from the other general characteristics of the same kind of pencil?

A. Mr. Hirsch may have marked them, and I can only identify these pencils as the same delivered to him for his safe-keeping.

X Q. 17. Do you identify them as such in any other way than that they resemble in appearance those you gave to Mr. Hirsch?

A. I identify them by their bearing the stamp "Union Extra, No. 2."

X Q. 18. Is that your only means?

A. Yes; so far as I can think of.

X Q. 19. That stamp is upon all pencils of the kind, is it not?

A. It is; but the figure, which is a flag, is stamped partly over on the paper tube, which cannot easily be seen by parties that don't know that the pencils consist of two pieces, namely, the tube and the pencil, but by me, being experienced in the process of manufacture.

X Q. 20. That is true, is it not, of all this kind of pencils?

A. It is.

X Q. 21. Who is Mr. Hirsch, to whom you have referred?

A. Mr. Hirsch is connected with the Eagle Pencil Company.

25 And being re-examined by complainant's counsel:

Redirect Q. 22. Is the Mr. Hirsch you refer to the Mr. Isaac Hirsch here present?

A. He is.

JOSEPH ILLFELDER.

Sworn and subscribed to before me this 21st day of November, 1872.

E. G. THOMPSON,
Examiner.

Mr. ISAAC HIRSCH, a witness on the part of the complainant, being called and duly sworn, to interrogatories propounded by plaintiff's counsel, says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Isaac Hirsch; I am 40 years of age; I reside at No. 216 East 39th street, in the city of New York; I am interested in the Eagle Pencil Company.

Q. 2. Do you know Mr. Illfelder, the witness who has just been examined?

A. Yes, sir.

Q. 3. Please look at complainant's exhibit No. 2, and state whether or not Mr. Illfelder delivered those pencils to you, when he made such delivery, to the best of your recollection, and in whose possession they are, if you know?

A. They are the same pencils Mr. Illfelder delivered to me about the end of May, 1872, and they were always in my possession till they were delivered here in evidence.

And being cross-examined by defendant's counsel, says:

26 X Q. 4. You are the agent of the plaintiff in the prosecution of this suit, are you not?

A. I am.

ISAAC HIRSCH.

Sworn and subscribed to before me this 21st day of November, 1872.

E. G. THOMPSON,
Examiner.

Examination adjourned to November 25th, 1872, at 2 p. m.

United States circuit court.

RECKENDORFER
vs.
FABER.

NEW YORK, *November 25th*—2 o'clock p. m.

Met pursuant to adjournment.

Present, counsel for both parties.

EDWARD S. RENWICK, a witness for complainant, being called and duly sworn, in answer to interrogatories propounded by complainant's counsel, says:

Q. 1. What is your name, age, residence, and occupation?

A. Edward S. Renwick; forty-nine years of age; I reside at Milburn, New Jersey, my place of business being in the city of New York; I am occupied principally in acting as expert in the trial of patent-causes and in soliciting patents.

27 Q 2. Please state briefly your acquaintance and experience in the theory and practice of the mechanic arts and as an expert in patent-causes?

A. After I was educated as a mechanic and civil engineer, I was engaged practically in the construction of machinery, and in the superintendence of machinery and motion, for about ten years. For the greater part of the last twenty-three years I have been engaged in my present occupation, and during that time have had occasion to make numerous investigations in the history of the useful arts, as found recorded in American and European patents, in the records thereof, and in printed works; I have also had to examine and compare a great number of machines of various descriptions for the purpose of ascertaining

their similarities and differences; I have prepared specifications for a great number of patents for machines of various descriptions; I have been called to testify in a large number of patent cases.

(Counsel for complainant offers in evidence the patents, Lipman, with certificate of extension, granted to Hymen L. Lipman, No. 19703, dated March 30, 1858, for "a combination of lead-pencil and eraser," with the certificate of extension for the further term of seven years from and after the 30th day of March, 1872, marked "Complainant's exhibit No. 5."

Also, letters-patent re-issued to Joseph Reckendorfer, No. 3863, dated March 1st, 1870, for improvements in pencils, marked "Complainant's exhibit No. 6."

It is hereby stipulated and agreed between the counsel that all patents which have been or may be put in evidence, and made exhibits in this case, copies may be substituted for the orignal, the original being produced in case any controversy should arise as to the correctness of any of the copies.)

28 Q 3. Have you read, and do you understand, the specifications of the plaintiff's patents, Exhibits No. 5 and No. 6, which are herewith produced and placed in your hands?

A. I have read the exhibits referred to in the question, and believe that I understand the contents of each of them.

Q 4. Please examine the lead-pencils herewith produced and exhibited to you, being the plaintiff's exhibits Nos. 2, 3, and 4, alleged to be the manufacture of the defendants, and state your opinion as an expert in regard to the identity of those articles with the articles described and referred to in the claims in the patents referred to in your last answer?

(Counsel for defendant objects so far as the answer of the witness is his construction or founded upon his construction on the letters-patent and the specification and claim annexed.)

A. I have examined the Exhibits Nos. 2, 3, and 4, and have compared them with the things that are recited in the claims of Exhibits Nos. 5 and 6. In my opinion the pencils, Exhibit No. 2, embody in substance the combination of instrumentalities recited in the claim of Exhibit No. 5; and the pencils, Exhibit No. 3 and Exhibit No. 4, embody in substance the several combinations of instrumentalities recited in the claim of Exhibit No. 5 and in the two claims of Exhibit No. 6.

Q 5. Please state the reasons upon which the opinion which you have given is founded?

A. My reasons for stating that the pencils, Exhibits Nos. 2, 3, and 4, embody in substance the combination of instrumentalities recited in the claim of Exhibit No. 5, are as follows:

The said combination, as I understand the contents of the patent, is one of the lead of a pencil and a piece of India rubber or other erasive substance with the holder or casing of the pencil in such manner
29 that the lead is arranged at one end of the said holder or casing, and the India rubber at the other end thereof, and that a fresh portion of either the lead or the India rubber may be exposed for use by cutting away the casing.

Now, in each of the pencil Exhibits Nos. 2, 3, and 4, I find a casing or holder which is composed in part of wood and in part of paper material firmly secured to the wood. I also find a pencil-lead arranged at one end of the said casing in the same manner as the lead described in said patent is described as arranged in the holder represented in the said patent. I also find in each of said pencils a piece of a compound of India rubber arranged at the opposite end of the said

holder in the same manner as the India rubber described in the said patent is described as being arranged. I also find that in each of said Exhibits 2, 3, and 4 the holder or casing, the lead, and the rubber are combined together substantially as described in the said Exhibit No. 5, and with the same mode of operation—a fresh portion either of the lead or of the India rubber being exposed for use by cutting away the holder or casing.

My reasons for stating that the pencils, Exhibits Nos. 3 and 4, are in substance the pencils recited in the two claims of Exhibit No. 6, are as follows: The pencil recited in the first claim of said patent, as I understand the same, is composed of a wooden sheath and a lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article of larger section than the lead; and the pencil recited in the second claim of the said patent is a pencil the wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end (in which the lead core is enclosed) for the whole or a portion of its length.

Now, I find in each of said pencils, Exhibits 3 and 4, a sheath which is the equivalent of a sheath composed wholly of wood, for the purposes of containing and protecting the lead and the eraser or other article of larger section, of combining the lead and other article together, so that the said lead, other article, and sheath constitute one implement, viz, a compound pencil, and for the purpose of permitting fresh portions of the lead or other article to be exposed for use by cutting away one or other end of the sheath, as may be required for the purpose; the end of the sheath opposite that in which the lead core is contained being enlarged, and having a recess in it to constitute the receptacle for an eraser, of larger section than the lead, as referred to in the said claim, and described in the portion of the patent preceding the said claim.

I also find that the said pencils, Exhibits 3 and 4, have a case which is the equivalent of a wooden case, and which gradually tapers from its enlarged and recessed head towards its opposite end (in which the lead core is enclosed) for the whole of its length, as recited in said second claim, and represented in the drawing of the patent.

In making the foregoing statements, I have taken into consideration the fact that the holders or casings of the pencils, Exhibits Nos. 2, 3, and 4, are not composed entirely of wood, but of wood and paper material combined, whereas the only material for the case or sheath recited in Exhibit No. 6 is wood; but I do not regard this difference as material, because, as I have already stated, the case of wood and paper material combined is the equivalent of a wooden case for the purposes of combining the lead and article of larger section together in one implement, and of permitting fresh portions of the lead or other article to be exposed for use, by cutting away the one or other end of the case or sheath.

E. S. RENWICK.

Cross-examination adjourned to Wednesday, November 27, at 11 o'clock a. m.

NEW YORK, *November* 27, 1872—11 a. m.

Met pursuant to adjournment.

Present, counsel for both parties; and the witness, Edward S. Renwick, being cross-examined by John S. Washburn, esq., deposes and says:

X Q 6. When was your attention first called to the letters-patent, com-

plainant's exhibits Nos. 5 and 6, with reference to your testifying as an expert for complainant in this cause?

A. About the 15th of November of this year.

X Q. 7. By whom?

A. By Mr. Edmund Wetmore, counsel for the complainant.

X Q 8. Prior to that, had you made any special examination of them?

A. I had not.

X Q. 9. Did you ever see the pencil described in and referred to in Exhibit No. 5?

A. I have seen pencils substantially the same as those represented and described in Exhibit No. 5, but do not recollect ever having examined them prior to November 15th for the purpose of ascertaining whether they agreed in all respects with the pencils represented in the drawing of Exhibit No. 5.

X Q. 10. Have you ever seen a pencil corresponding exactly with that shown in the drawing of Exhibit No. 5, and not merely, in your opinion, "substantially?"

A. I cannot say with certainty that I have seen such a pencil as is mentioned in the question.

X Q. 11. What pencil do you refer to as being "substantially the same" as that represented and described in Exhibit No. 5, in your opinion?

A. I have seen pencils for sale by stationers, and also in use in offices, which appeared to be substantially the same as the pencil de-
32 scribed and represented in Exhibit No. 5; some of them may, in fact, have been identically the same, for aught I know; but at the time that I saw them my attention had not been specially called to the patent, and I did not examine such pencils for the purpose of ascertaining whether or not they were identically like the pencil represented in the drawing of the patent.

I have also seen the exhibits in this case, which, as I have stated before, are substantially the same as the pencil described and represented in Exhibit No. 5, and since November 15 I have seen other pencils than the said exhibits, but identically the same as some of them, in the possession of the counsel for the complainant.

X Q. 12. With exception of the exhibits in this case and others identically the same, has your attention ever been called to any pencils the same or, in your opinion, substantially the same as that represented and described in Exhibit No. 5?

A. My attention was never specially called to the subject-matter of such compound pencils as are described in Exhibit No. 5 previous to Nov. 15th inst., or thereabouts, and since that date I do not recollect to have seen any pencils of that description except the exhibits in this case and others identically the same as them to all appearance.

X Q. 13. Is your testimony-in-chief, then, founded upon solely those exhibits and others identically the same, to all appearance, and your construction of Exhibit No. 5?

A. My testimony-in-chief is founded upon my understanding of what is represented and described in Exhibits Nos. 5 and 6 and recited in the claims thereof, and upon my general knowledge of the subject of pencils, and as a mechanical expert, and upon a comparison of the pencil exhibits in this case, with the descriptions, representations, and recitals of Exhibits Nos. 5 and 6. I do not profess to have made a legal construction of Exhibits Nos. 5 and 6.

33 X Q. 14. Please look at the certified copy of the file-wrapper and contents of the application for letters-patent granted Hymen

L. Lipman, dated March 30, 1858, No. 19783, (marked, for identification, "Exhibit T., E. G. T., Exr., November 27, 1872,) and at the copy of the original specification and claim of said Lipman, and his subsequent amendment thereof therein contained, and state in what respect, if any, the pencil described and referred to in said original specification and claim differs from that described and referred to in said amendment.

A. I have examined the file-wrapper, &c., referred to in the question. I find that the portion of the original specification preceding the erased claim describes what purports to be a pencil which is the same as that in the patent, but as there are no drawings connected with the papers shown me, and as a copy of the original specification refers to drawings, I cannot be absolutely certain on this point.

As respects the claim of the original specification and that written in the amendment, I may say that the former does not mention the construction and arrangement of the whole article, while the latter claim does; and, therefore, although both claims refer to the same description and the pencil described and represented, yet the former appears to recite only the combination in one pencil of the lead and India rubber, without any restriction as to the construction of the holder or the arrangement of the lead and India rubber therein, whereas the claim in the amendment recites the construction and arrangement of the three parts of the pencil mentioned therein.

X Q. 15. Please state what "construction and arrangement" appears, in your opinion, to be represented different from that which, in your opinion, is represented by the original specification and claim?

A. The claim of the amendment recites the construction and arrangement of the lead, the India rubber, and the holder, substantially
34 in the manner described in the descriptive portion of the original, and represented in the drawing thereof; and, assuming that that drawing is the same as that attached to the patent, the construction and arrangement referred to is that of a holder of a pencil composed of a material that can be cut for the purpose of sharpening either end, and of a lead at one end of said holder and of a piece of India rubber within the other end of said holder.

The claim of the original, as I understand it, requires only that the same pencil shall have both lead and India rubber as parts of it, whether the lead, India rubber, and holder be constructed and arranged as described in the preceding portion of the original or in any other way.

To express the idea in a different way, I may state that the pencil recited in the claim of the original patent constitutes what may be termed a class or genus, which may contain a number of species, while the pencil recited in the claim of the amendment is a species of pencil having a peculiar construction and arrangement of the lead, India rubber, and holder.

X Q. 16. Do you mean that the original specification and claim includes every combination of eraser in connection with a lead-pencil?

A. The language of the original, considered as a whole, appears to me to include every combination in one pencil of both lead and an erasive substance.

X Q. 17. In your answer to the 15th cross-question you have said: "The claim of the original, as I understand it, requires only that the same pencil shall have both lead and India rubber as parts of it." Please state the language from which you derive that opinion.

A. I quote as follows: "Be it known that I, Hymen L. Lipman, of Philadelphia, in the county of Philadelphia, and State of Pennsylvania, have invented a new and useful lead-pencil and eraser." * * * *

"What I claim as my invention, and desire to secure by letters-patent, is, the combination in one pencil of both lead and India rubber,
35 (or other erasive substance,) laying no claim to either substance when separately used."

And the above-quoted language of the claim is not followed by language making any reference to the preceding description which intervenes between the claim and the preamble.

X Q. 18. Is not the pencil thus described and referred to one in which the lead and eraser are both "in" the pencil?

A. I do not understand it to be necessarily so. Such a pencil as is mentioned in the question would undoubtedly be comprehended within the language, but the language does not exclude other arrangements of the lead or of the eraser. For example: Suppose I should speak of the combination in one chair of the back, the seat, and the rockers, it would not necessarily follow that the rockers were to be within the chair.

X Q. 19. Do you consider your illustration of a chair to be an analogous case?

A. Perfectly analogous as respects the rockers and the eraser; because rockers might be arranged at the exterior of the legs of a chair or arranged at the inner sides of the legs, or arranged so that a portion of the rocker was within the legs and a portion projected beyond them. I have seen rockers arranged in each of these ways in rocking-chairs.

X Q. 20. Is it possible to have rockers inside the chair itself?

A. As the rockers are part of the chair, they must of necessity be within its perimeter, and in that sense inside of it.

X Q. 21. Is that the only sense in which you so answer affirmatively?

A. I might state further that in one of the forms of rocking-chair which I have seen, and referred to in one of my previous answers, portions of the rockers are within other parts of the chair, as, for example, where such portions are introduced in slots cut in the legs of the
36 chair, while other portions protrude from thel egs, just as in the pencil represented in the drawing of Exhibit No. 5, a portion of the eraser is within the holder of the pencil and a portion of it protrudes from that holder.

X Q. 22. In stating what in your opinion is described and referred to in an original specification and claim, do you not consider the language of the specification as well as that of the claim?

A. Where I give an opinion as to what is described in an original specification and claim, I undoubtedly consider the language of the entire document, and if in doing so I find the language of the claim is indefinite and does not refer to the previous descriptive portion of the document, I understand, as a mechanic, that the language of the claim comprehends every mechanical construction of the instrumentalities recited in it, including such a one as is previously described, as well as others which are not described in the descriptive portion preceding the claim.

X Q. 23. Do you understand that a pencil in which the eraser consists of a cap of rubber stretched over the end of the lead-pencil would be included in the claim of the said original specification?

A. I do.

X Q. 24. Do you not find in said original specification the following language: "I make a lead-pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, A, and insert in this groove a piece of prepared India rubber, (or other erasive substance,) secured to the said pencil by being glued at one

edge," and the claim being of the combination of "both" lead and India rubber "in" one pencil, in what respect is such claim indefinite?

A. I find in the original specification the language of the first quotation in the question. The language of the claim is in the following words:

"The combination in one pencil of both the lead and India rubber."

37 * * * Now, this claim, as I understand the language, is indefinite, in the respect that there is no reference in it to the descriptive portion, part of which is quoted in the question, and the gist of the invention, as is recited in the claim, appears to me to be the combination of both lead and India rubber in one pencil, as distinguished from the combination of the lead in one pencil and the India rubber in some other way or with some other implement. The combination, therefore, recited in the claim is a broad combination of lead and India rubber in the same pencil, without definitely specifying or requiring the relative arrangement of the lead and rubber, or any peculiar construction of the implement.

X Q. 25. In your opinion, is there any other indefiniteness in the claim, except that it does not refer to the descriptive part of the specification?

A. There is indefiniteness in the respect that it does not refer to the construction described, but as the construction is described in the descriptive part of the specification, a reference in the claim to such construction would have made it plain in that particular; so that if the reference to the descriptive part in the specification had been comprehensive enough there would have been no indefiniteness.

X Q. 26. You have referred to negative indefiniteness; in your opinion, is there any affirmative indefiniteness?

A. I do not understand the question.

X Q. 27. You have stated that it was indefinite in not referring to the descriptive part, also in not describing or stating in itself any particular construction; is it indefinite in any other respect?

A. Not that I am aware of.

X Q. 28. What meaning do you attach to the word "in" in the claim?

A. I attach to it the meaning of present.

X Q. 29. How do you apply that meaning which you attach?

38 A. I apply it in this way: that both the lead and India rubber referred to are to be present as forming component parts of the pencil, as distinguished from one or the other being absent or separated from the other parts of the pencil.

X Q. 30. What objection do you see to the ordinary signification of the word "in," as equivalent to "within," or "inside?"

A. As I understand the use of the word "in," the meaning which I have given is about the most ordinary one for that preposition, and the objection to the meaning "inside" or "within," when applied to the connection in which the word "in" is used in the claim, is that there is nothing in the claim which to my mind requires or suggests those meanings of the word. Whereas the use of the words "in one pencil," and the last part of the claim, viz, "laying no claim to either substance when separately used," convey the idea to my mind that the word "in" has the common meaning which I have given to it, especially as I have frequently known it to be used in the same manner when applied to machinery to express the same meaning.

X Q. 31. Were you to consider the descriptive part quoted in connection with this claim, would you have any doubt that the meaning of "within" or "inside" was intended to be given to the word "in?"

A. Taking the language of the claim as it stands, I should have no doubt that the meaning of "within" or "inside" was not intended to

be given to the word "in," even though I considered the descriptive part of the specification; because there is no reference in the language of the claim to the preceding descriptive part which is quoted in the first part of cross-question 24.

X Q. 32. Is there any language in the descriptive part of the original specification which, in your opinion, describes or includes the invention as or of other than the combination of lead and eraser inside an ordinary pencil; and, if so, what language?

39 A. The descriptive part of the specification preceding the claim does not describe or include any other construction of pencil than that in which the lead and eraser are inserted within a pencil constructed in the usual manner, or some equivalent thereof.

X Q. 33. What language do you find, if any, referring to any equivalent of that construction?

A. I find that the language does not speak of equivalents, but I have always understood that a description of an implement composed of parts always includes the equivalents of such parts.

X Q. 34. Do you consider a pencil having an eraser attached in the form of a rubber cap, stretched over and surrounding the end of a lead-pencil, such an equivalent?

A. I do consider it the equivalent, so far as respects the fact that in both there is broadly the combination of the holder, the lead, and the eraser. But I do not consider it the equivalent as respects the peculiarity of the arrangement of the rubber within the holder. The pencil referred to in the question, therefore, is not the equivalent of the one described in the descriptive part of the specification preceding the claim, if the latter is restricted not only to the parts of which it is composed, but also to the construction and arrangement of these parts relatively to each other as therein described.

X Q. 35. In your opinion, is it restricted "to the construction and arrangement of those parts relatively to each other as therein described?"

A. The descriptive part of the original specification preceding the claim, as I understand the matter, is restricted as stated in the question; but, of course, would include or comprehend equivalents for the parts which are described.

X Q. 36. In your answer to the 15th cross-question, you speak of the holder of a pencil, as described and referred to in the claim of the amendment, as being "composed of a material that can be cut." What language do you find in that amendment, or in Exhibit No. 5, from which you derive that opinion?

40 A. If I am restricted to the amendment alone, and not permitted to refer to the original specification, to which the said amendment is to be applied, I don't think that there is any language which would enable me to derive the opinion from it; but if I consider the amendment in connection with such portions of the original specification as are not erased by the amendment, I find the following language from which I derive my opinion, viz: "I make a lead-pencil in the usual manner;" * * * "the pencil is then finished in the usual manner, so that on cutting one end thereof, you have the lead B, and on cutting at the other end, you expose a small piece of India rubber, C." I find the same language in the patent, Exhibit 5, and derive the same opinion from it, when taken in connection, in both cases, with the following language, which I find in both the claim of the amendment and the claim of Exhibit 5, after the enumeration, among other things, of the holder, "the whole being constructed and arranged substantially in the manner and for the purposes set forth."

X Q. 37. To a lead-pencil of what material do you understand the expressions contained in the specification of Exhibit No. 5, of "I make a lead-pencil in the usual manner;" and again, "finished in the usual manner;" and again, "ordinary lead-pencil," to refer?

A. The lead-pencil referred to in the first two quotations I understand to be the lead-pencil recited in the claim, composed of wood, lead, and India rubber as materials, combined and arranged substantially as described. The lead-pencil referred to in the third quotation I understand to be an ordinary lead-pencil composed of the materials wood and lead, combined and arranged in the ordinary manner.

X Q. 38. Do you find any language in Exhibit No. 5 to, in your opinion, describe or include a holder of the pencil other than one continuous wooden sheath; if so, what?

41 A. I do not find any language in Exhibit No. 5 which describes a holder of the pencil which is other than one continuous wooden sheath; but I understand that the language which is given in the claim includes the equivalent of a wooden sheath among other things; or, in other words, the equivalent of a holder such as is represented in the drawings of the patent, and having the properties which are described in the specification.

X Q. 39. What language?

A. The language in the claim to which I refer particularly are the words which follow the enumeration of the parts which are combined, viz, the words "the whole being constructed and arranged substantially in the manner and for the purpose set forth."

X Q. 40. In your opinion, is every holder, whether of wood or any other material in whole or in part, or continuous or otherwise, the equivalent of the holder described?

A. Certainly not.

X Q. 41. What element, if any, which, if added, will, in your opinion, render it such equivalent?

A. In order that a holder may be the equivalent of the one recited in the claim, it must be constructed substantially in the manner of the one described in the preceding portion of the specification, and of a material or materials which impart to the pencil the same properties or qualities as are required by such preceding portion; thus, for example, the holder must be constructed so as to contain the lead and the India rubber within it, and at its opposite ends, and in such manner that the lead and the India rubber are firmly supported by the material or materials of which the holder is composed; the holder must also be of a material or materials which can be readily cut away, as the wood sheathing of an ordinary pencil is cut, for the purpose of removing the material of the holder from either the lead or the India-rubber, so as to expose a fresh portion of
42 either for use, as the protuberant part is worn away. I do not understand that it is necessary that the holder should be of one piece of material, or of one material only.

X Q. 42. If additional properties and advantages are imparted than are shown by the patentee, Lipman, would it still be an equivalent, in your opinion?

A. If the change does not destroy the combination, construction, and arrangement recited in the Lipman patent, the additional properties and advantages imparted would not prevent the article referred to in the question from being an equivalent.

X Q. 43. Is the capability of the lead and rubber being cut away at the respective ends of the pencil described in Exhibit No. 5, other than a result of its peculiar construction?

A. I understand that they are properties of the parts of the combination, and not the result of the combination.

X Q. 44. Do you mean that any material, although securing additional and increased advantages and utility, is an equivalent of the continuous wooden sheath, simply because both might be capable of being cut?

A. No; not for the reason given in the last part of the question alone. The material to be an equivalent must be fashioned into a sheath, constructed as described in my answer to cross-question 41, and it must, in addition, have the property of being readily cut away, as the wood sheathing of an ordinary pencil is cut, for the purpose stated in that answer. It might, in addition, be a stronger material than wood, so that it might be made thinner; or it might be of a material which is more readily manufactured into the sheath than wood is; and in such case the holder might be an improved holder, as compared with the holder or case described in the descriptive part of the Lipman patent, being the equivalent of the Lipman holder in the combination, construction, and arrangement recited in his claim, and, in addition, imparting to the pencil properties which were peculiar to itself.

43 Adjourned to Friday, November 29th, at 11 o'clock a. m.

The United States circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

NEW YORK, *December 6th*, 1872.

Met pursuant to adjournment.
Counsel for both parties present.

Cross-examination of Mr. Renwick continued:

X Q. 45. Were the words "the whole being constructed and arranged substantially in the manner and for the purposes set forth" added to the claim in the original specification, would, in your opinion, the same thing be described and claimed as is in Exhibit No. 5?

A. As I understand the question, it has reference only to the original specification, including the descriptive matter; the claim and the reference to the drawing, which I presume to be the same as that found in Exhibit No. 5. If the words stated in the question were inserted in the original claim, before the word "laying," my impression is that
44 the claim would be broader in its signification than the claim of the exhibit, although the descriptive part of the specification referring to the drawing, commencing with the words "I make" and ending with the words "desk," describe the same pencil as is described in said exhibit.

X Q. 46. In what respect?

A. I think the signification of the claim would be broader in the respect that it would include, not only the pencil described in the previous portion of the specification, but also pencils having holders constructed differently from the holder represented in the drawings of the patent; but having the lead and India rubber constructed and arranged substantially in the same way relatively to each other as represented in said drawing.

X. Q. 47. How differently?

A. If the claim were amended as assumed, there would not, in my opinion, be necessarily a limitation of the thing claimed to a holder constructed of a material which could be cut at each end. Consequently the claim would be broad enough to include a holder of the lead and India rubber constructed of metal which could not be cut with a knife.

X. Q 48. Would not the words quoted, if added, limit the construction and arrangement to substantially the same as described in the descriptive part, and shown in the drawing?

A. It would limit the construction and arrangement of the combination of lead and India rubber previously recited in the claim to substantially the same described in the descriptive part, and shown in the drawing; but it would not necessarily limit the construction of the holder to substantially the same as is described and represented in the drawing.

X. Q. 49. Do you mean more or other than that equivalents of the holder would still be included?

A. I meant precisely what I stated in my preceding answer. The holder, as I understand the matter, is not specified in the claim
45 as a part of combination claimed. And its peculiar construction would constitute no part of the combination; consequently the combination of the lead and India rubber might, in such event, be effected in a holder of any description which would admit of the lead and India rubber being constructed and arranged substantially as described, whether such holder was constructed of wood or of a hard metal such as silver or gold, which are commonly used as holders for the leads of pencils. In such event, a hard metallic holder would be the equivalent of a wooden holder for the purpose of combining the lead and the India rubber.

X Q. 50. How is the thing shown in Exhibit No. 5 limited?

A. In Exhibit No. 5 the claim, in addition to reciting the lead and the India rubber as members of the combination, also recites the holder as one of said members; and then states further, that the whole is to be constructed and arranged "substantially," etc. This language, in my opinion, limits the combinations of lead, India rubber, and holder to, among other things, the construction of the holder, substantially in the manner and for the purpose set forth in the specification; and therefore limits the combination, among other things, to a holder constructed of such a material that it may be cut at each end for the purpose of exposing the lead and the India rubber, as previously described. The limitations, as respects the India rubber and the lead, have previously been mentioned by me in my answer to question 5.

X Q. 51. What do you mean by the expression "among other things?"

A. The claim, as I understand the language, limits the combination not only to the construction and arrangement of the holder, but also to the construction and arrangement of the lead and the India rubber. The lead being constructed of such a material as will produce marks, and can be sharpened, and is in the form of a rod; the India rubber being constructed of a substance that will erase the marks of the lead;
46 and the India rubber and lead being arranged at opposite ends of the pencil. The construction and arrangement of the lead and India rubber are the other things or other limitations of the thing recited in the claim.

X Q. 52. Is not the holder you have stated as referred to in Exhibit No. 5 confined to the holder of an ordinary lead-pencil made in the usual manner?

A. I understand that it is not so confined. I understand that it is

confined only to the holder of an ordinary lead-pencil, modified so as to receive and combine the lead and India rubber, or to the equivalent of such a modified holder, for the purpose of combining together the lead and the India rubber, and for being cut away at each end as required to expose fresh portions of the lead and India rubber as required in the use of the implement.

X Q. 53. In your answer to the 43rd cross-question you have stated that you understand the capability of the lead and rubber of being cut away at the respective ends of the pencil described in Exhibit No. 5 to be "properties of the parts of the combination." Do you mean other than that (so far as the holder is concerned) such capability is a property of the material, viz, wood, of which the holder is composed?

A. I am not aware that the wood is referred to in any manner in my answer to the 43rd cross-interrogatory. What I meant was that the capabilities of the lead and rubber to be cut away are properties of two parts of the combination; which parts are the lead and the rubber; and I meant nothing more.

X Q. 54. You have stated that in Exhibit No. 5 the holder is an element of the combination, the rubber and lead being combined in it. The preceding question is now repeated.

47 I cannot perceive that what I have stated, relatively to the holder, can in any manner change what I have said in reference to the lead and the India rubber; and that the preceding question requires any other answer than that I have already given.

X Q. 55. In the pencil to which you have referred, could the lead and rubber be cut without cutting the holder?

A. Whether they could or could not depends upon circumstances. If the pencil were made in the usual way, with the wooden holder enclosing the lead to its end, and the opposite end of the holder were made in like manner in reference to the India rubber, neither the lead or the rubber could be cut without cutting the holder. But if the holder were made so as to expose the lead protruding at one end and the India rubber protruding at the other, both the lead and the India rubber could be cut to some slight extent without cutting the holder; they could, in fact, be cut until the protruding portions were removed.

X Q. 56. In your opinion, does Exhibit No. 5 describe or include a pencil in which the rubber protrudes beyond the wooden holder without previous cutting of the holder?

A. Assuming that the pencil is substantially the same in other respects with the construction, combination, and arrangement recited in the claim, Exhibit No. 5 would, in my opinion, comprehend such a pencil with the India rubber protruding beyond the wood without any cutting of the wood after the pencil was finished for use.

X Q. 57. Provided the eraser extended three-fourths of its entire length beyond the wooden holder, would it still be described or included in Exhibit No. 5?

A. If the pencil in other respects still contained the combination, construction, and arrangement recited in the claim, it would still be comprehended by the language of the Exhibit No. 5, whether three-fourths of the eraser protruded beyond the holder or there was no protrusion.

X Q. 58. Now define those "other respects."

48 A. The "other respects" are those which I have mentioned in several of my previous answers, viz, in my answer to question 5; in my answer to cross-question 41, as respects the holder; and in my answer to cross-question 51, as respects the lead and India rubber. If,

however, those answers are not in such language that they can be understood, I will endeavor, if possible, to restate the matter.

X Q. 59. In those answers I have understood you to include, as an essential element, a holder capable of being cut away so as to expose fresh surfaces of the rubber and lead. If, now, the rubber protruded beyond the holder three-fourths of its length, would such capability of holder being cut away be either a necessity or an advantage, so long as sufficient portion of the eraser, for erasing purposes, protruded beyond the holder?

A. The capability of being cut away at the rubber end would not be a necessity as long as a sufficient portion of the rubber protruded for erasive purposes; but the capability would be an advantage, because it would enable the residue of the rubber to be used when occasion required.

X Q. 60. If only a sufficient portion of the eraser was enclosed in the holder to enable it to be secured thereto as a matter of attachment, would such a pencil be, in your opinion, described or included in Exhibit No. 5?

A. If the pencil were in other respects, that is, as respects the lead and the holder, substantially the same as recited in the claim of the exhibit, it would still, in my opinion, be included by said exhibit, although it would embody the invention in an inferior form as compared with the embodiment represented in the drawings of the patent.

X Q. 61. In the case of such pencil as is described in last preceding question, would it make any difference whether the holder was made of material capable of being cut with a knife or not?

A. Certainly it would.

49 X Q. 62. What?

A. The difference would be that if the holder was made of a material which could not be cut, the portion of the eraser which was contained in it could not be used. Whereas, if the holder could be cut, the eraser could be used up as far as practicable. There would also be a difference in the construction of the holder, one of the properties incident to the construction of a material that could be cut being absent in the former case.

X Q. 63. Cross-question 60 describes a pencil in which "only a sufficient portion of the eraser was enclosed in the holder to enable it to be secured thereto as a matter of attachment." Would the capability or non-capability of being cut in such a case be material?

A. It would be material, of course, both as respects the construction of the article and its use.

X Q. 64. Do you consider that it is an essential of the pencil shown in Exhibit No. 5 that the holder should be composed of a material capable of being cut with a knife?

A. I do, as I have already stated several times in the course of this examination; but do not consider it essential that such material should be one continuous piece from end to end.

X Q. 65. Would, then, a pencil precisely the same as the pencil described in cross-question 60, with the one exception that the holder is composed of a material not capable of being cut with a knife, be, in your opinion, the equivalent of the pencil in said cross-question described?

A. If the pencil were made as I understand it to be in the present question, it would be impracticable to cut the holder with a knife as described in the patent; and, in my opinion, such a pencil would not be an equivalent in all respects of the pencil described in cross-ques-

tion 60, but would be an equivalent for it in certain particulars;
50 for example, the pencil described in the present question would not be the equivalent for the pencil described in cross-question 60, in respect to one quality or property which permits the lead and the India rubber to be exposed, as worn away, until they are exhausted. In other respects the former would be the equivalent of the latter.

X Q. 66. In your opinion, is such a pencil as is described in cross-question 60 the equivalent of a pencil in which the holder covers, and must be cut away to expose the erasive surface?

A. The pencil that is described in cross-question 60, as I understood the language at the time, is one in which the holder is of wood, or equivalent material, inclosing at one end the lead, and inclosing at the other end a portion of the India-rubber eraser; such a pencil is a substantial mechanical equivalent in the combination, construction, and arrangement of its parts with one in which the holder covers the whole of the eraser and must be cut away to expose it; but the former is not as good an article in degree as the latter.

X Q. 67. In your opinion, were these described and claimed simply the combination of India rubber or other erasive material inserted in the end of an ordinary lead-pencil made in the usual manner with such ordinary lead-pencil, would it differ, and, if so, how, from what is described and referred to in Exhibit No. 5?

A. The language of the question, as I understand it, appears to contain things which are incompatible with each other; as it assumes, first, that the India rubber is to be inserted in the thing claimed; and, secondly, that after such insertion the lead-pencil is an ordinary lead-pencil. The only understanding of the language under which I can answer the question, is by assuming that the pencil, as claimed, is one in which a piece of India rubber, or other erasive material, is inserted in one end of the holder of the pencil, and in other respects the pencil is like an ordinary lead-pencil. If, in such event, the description
51 spoke of the sharpening of the pencil by cutting away the wood at one end or the other, as required, I should say that the pencil described and claimed was substantially the same as is described and referred to in Exbibit 5; but if the language of the descriptive portion preceding the claim did not describe or refer to the cutting of the holder for the purpose of sharpening each end of the pencil, and contained indefinite language which tended to broaden the scope of the claim I should say that the thing claimed was broad enough to include not only a pencil having the peculiarities of holder and of insertion of the holder, such as is described and referred to in Exhibit No. 5, but also a holder and rubber constructed or applied differently in some respects. It would be impracticable for me to give a more definite answer to the question, unless the entire hypothetical description and claim assumed in the question be submitted to me; as a variation in the language may make a material difference in my understanding of the thing claimed.

X Q. 68. Simply, and without long verbiage, is not what is described and referred to in Exhibit No. 5 the combination derived from the insertion of India rubber or other erasive material in the end of an ordinary lead-pencil?

A. It is not.

X Q. 69. Is it not in fact the combination derived from the insertion of such a piece of India rubber or other erasive material as is described and referred to in Exhibit No. 5, in such portion of the lead-groove as

is referred to in said exhibit, reserved for that purpose in the end of an ordinary lead-pencil?

A. The statement in the question does not properly describe what is described and referred to in Exhibit No. 5, because, as I understand the language of the question, it omits the construction and arrangement of the parts of the combination as limitations of the thing described and referred to in the claim; and, on the other hand, the language of
52 the question appears to restrict the insertion of the India rubber in the lead-groove, when no such restriction, as I understand Exhibit No. 5, is contained in it; and the drawing of the patent shows that a special groove, called in the patent "a groove of suitable size," is made in the holder of the pencil for the reception of the India rubber.

X Q. 70. What is omitted besides such enlarged groove?

A. I understand that the language of the preceding question omits the fact that the construction and arrangement of the parts is to be substantially such as are described in the patent Exhibit No. 5; and on re-reading the question, (cross-question 69,) I perceive that the language is indefinite, in not stating which of several combinations that would be derived, or would result from the operation mentioned in the question, is the one that is intended.

X Q. 71. Is the capability of the holder being cut with a knife an essential element of the invention shown, or is it the result attained by the described application of the eraser to an ordinary lead-pencil?

A. The capability of the holder being cut is an essential element of the construction of the holder and of the construction, combination, and arrangement recited in the claim, which I understand to be the invention. The result that is obtained from this element of construction is, as respects the eraser, that a fresh portion of it may be exposed for use as required by wear.

X Q. 72. In your answer to question 5, you have repeatedly used the word "casing," both alone and in connection with the word "holder." Do you find the word "casing" in Exhibit 5?

A. I used the word "casing" as synonymous with the word "holder." I do not find the word "casing" in Exhibit No. 5.

X Q. 73. Is a lead-pencil having a tube attached to one end an "ordinary lead-pencil," or a lead-pencil made "in the usual manner?"

53 A. It is neither an "ordinary lead-pencil," nor is it made in all respects "in the usual manner." It may be made in the usual manner as respects the lead and the holder or casing, and it is not made in the usual manner as respects the addition of the tube, which is a thing supplementary to an ordinary lead-pencil.

X. Q. 74. Is a lead-pencil, to the end of which a piece of India rubber is attached by means of a ferule, an equivalent, in your opinion, of the pencil described in Exhibit No. 5?

A. Whether it is or is not depends upon circumstances which are not stated in the question. For example, if the ferule assumed in the question be a metallic ferule which cannot be cut for the purpose of exposing the India rubber, I should say that the hypothetical lead-pencil assumed in the question is not an equivalent for the pencil described in Exhibit 5; but if the ferule be of wood or equivalent material, holding the rubber substantially as described in the said exhibit, and having the capability of being cut away for the purpose of exposing the India rubber, I should say that the hypothetical pencil with such a ferule would be an equivalent with the one described in Exhibit 5.

Examination adjourned till Wednesday, December 11th, at 11 a. m.

NEW YORK, *December* 11, 1872—11 a. m.

Examination adjourned by consent of counsel to new notice.

NEW YORK, *December* 23*d*, 1872—11 a. m.

Present, counsel for both parties.

And the cross-examination of E. S. Renwick being continued by Mr. Washburn:

54 X Q. 75. Would, in your opinion, a pencil, the holder of which is formed of two parts, attached to each other, one the ordinary wooden holder, enclosing the lead, the other part composed of a material not having the property of being capable of being cut with a knife, enclosing the India rubber, be the equivalent of what you think is described in Exhibit No. 5?

A. As I understand the language of the question, such a pencil as is described in it would not, in my opinion, be the equivalent of what is recited in the claim of the Lipman patent.

X Q. 76. If, in such a pencil as described in the last question, the part holding the rubber were composed of a material having the property of being capable of being cut with a knife, would this property render it, in your opinion, the equivalent of what you think described in Exhibit No. 5?

A. If the combination and the arrangement of the lead and India-rubber in the said hypothetical pencil should be substantially the same as are described in the patent, then the said hypothetical pencil would be the equivalent of what I understand to be described and recited in the claim of Exhibit No. 5?

X Q. 77. Wherein, in your opinion, do the things described and referred to in Exhibits Nos. 5 and 6 differ from each other?

A. The thing described in the first claim of Exhibit No. 6 must have one end of the sheath enlarged, whereas the thing described in Exhibit No. 5 does not necessarily have one end of the sheath larger than the other. The thing described in the second claim of Exhibit No. 6 must have a sheath which tapers from its enlarged and recessed head towards its opposite end for the whole or a portion of its length, whereas the thing described in the claim of Exhibit No. 5 need not necessarily have a tapering sheath. The thing recited in the claim of Exhibit No.
55 5 must of necessity have a piece of erasing substance arranged in one end of the sheath, whereas the thing recited in each of the claims of Exhibit No. 6 need not have a piece of erasing substance arranged in its recessed head.

X Q. 78. Have you stated all the differences?

A. I believe I have.

X Q. 79. Is there any special utility gained, in your opinion, by these differences; and, if so, what and how?

A. The first difference mentioned enables a larger piece of erasing material to be embodied in the pencil without making the portion of the sheath which holds the head of large size throughout its entire length. The second difference mentioned enables the pencil to be made with a larger piece of erasing substance at one end, and with a sheath of comparatively smaller size at the other end than the recessed head, and without any abrupt shoulder, which might inconvenience the user of the implement. The third difference enables the implement to be constructed with a crayon or lead of large size, in place of India rubber, so that the pencil may contain the ordinary black lead at one end of the sheath and a colored crayon of larger size at the other end of the sheath, in place of a piece of erasing material.

X Q. 80. Why cannot such larger section of eraser and such crayon or lead of large size be contained in the pencil recited in Exhibit No. 5? Is there any mechanical intrinsic objection; and, if so, what?

A. A piece of India rubber of larger size than is represented in the drawings of Exhibit No. 5 can be used in a pencil made according to the exhibit; but whenever the size of the erasing material is increased up to the point that the strength of the sheath or holder is insufficient, when of ordinary size, to sustain the India rubber, the size of such sheath or holder would have to be increased from end to end, if
56 the manufacturer had no other knowledge than is derived from Exhibit No. 5 and the ordinary construction of lead-pencils. The objection to such an increase of the size of the sheath from end to end is, that the pencil, after a certain increase in size, would become clumsy, and would not be so convenient an implement for use.

X Q. 81. Were such larger section of eraser to be used in the pencil described in Exhibit No. 5, to the extent that the sheath or holder is sufficient to sustain it, in what way do you mean such insufficiency would appear?

A. It would appear, when the eraser was used, by the yielding or possible breaking of the portion of the sheath in which the India rubber is contained.

X Q. 82. Is the avoiding of this mechanical difficulty to be ascribed to the tapering shape in Exhibit No. 6, or is the tapering shape only an incident of the increased thickness at the end for the purpose of affording thicker walls for the support of such larger eraser than in Exhibit No. 5?

A. The difficulty is avoided in Exhibit No. 6—without making the portion of the sheath in which the lead is contained of too large size—by making the recessed head of the sheath larger than the portion of the sheath containing the lead. The tapering shape is not an incident to the increased size of the recessed head of the sheath, because this increased size may exist without the tapering form.

X Q. 83. Do you understand that the thing referred to in Exhibit No. 6 is limited to the insertion of erasive material, crayon, or lead of a different color or quality from the pencil-lead, in such enlarged receptacle?

A. I do not. I understand that the thing recited in each of those claims is not restricted to the use of any particular material in the enlarged and recessed head.

X Q. 84. Were there such or any material or thing attached to such a tapering pencil, in all respects the same, except that it does not
57 contain such recess or receptacle, would it, in your opinion, be the equivalent of what is shown, as you think, in Exhibit No. 6?

A. If the pencil assumed in the question has not got a recessed head it cannot be the equivalent of what is shown in Exhibit No. 6, however like it might be to what is so shown in other respects.

X Q. 85. Then, if to the large end of a tapering pencil an eraser or other article be attached by means of a separate tube or ferule, would it, in your opinion, be such an equivalent?

A. Whether it would or would not, would depend upon circumstances which are not stated in the question.

If, for example, the separate tube mentioned were a metal ferule which could not be cut with a knife to expose fresh portions of the India rubber, the pencil would not have a sheath which was the equivalent of the one recited in the first claim of the patent or the equivalent of the wooden case recited in the second claim of the patent.

If, on the other hand, the separate tube were composed of a material

which was the equivalent of wood for the purpose of being cut with a knife for the purpose of exposing fresh portions of the India rubber, and were combined with the wooden portion so that the compound article was the equivalent of the wooden sheath described in Exhibit No. 6; then the tapering pencil described in the question would, in my opinion, be the equivalent of the things recited in each of the claims of Exhibit No. 6.

X Q. 86. Do you find the capability of the sheath or holder being cut with a knife to expose fresh portions of the India rubber specified in Exhibit No. 6?

A. I do not find language that states the fact fully. But I find that whenever the case or sheath is spoken of in the preamble or in the claims of the patent it is specified as a wooden sheath or wooden case, which to my mind carries with it the idea that the said case or sheath
58 must have the properties of one composed of wood, and consequently the capacity of being cut away in order to expose fresh portions of the lead, and of the material contained in the recessed head.

X Q. 87. Do you understand such capability of being cut to expose fresh portions of the India rubber an essential element of the pencil referred to and claimed in Exhibit No. 6?

A. I understand the said capability to be an essential property of the pencil referred to and claimed in Exhibit No. 6; but that the said pencil is not restricted to India rubber as the material to be exposed by cutting away the head of the sheath or case.

X Q. 88. Is your said opinion derived solely from the use of the word "wooden" in Exhibit No. 6?

A. Not entirely; because I think that the fact of the enlargement of the head tends to convey the impression that the material is to be one which is comparatively weak. The drawings of the patent also, by representing the material as entirely enclosed in the enlarged head, convey the idea that the sheath must be of such a material that it can be cut away to expose the material in the head.

The patent also contains, in one place, the language, a pencil of otherwise ordinary construction, which also tends to convey the same idea. I consider, however, the use of the terms wooden and wood, as applied to the case or sheath in various parts of the specification, as conclusive evidence to my mind on this point.

X Q. 89. You state in your last answer that the patent contains in one place the language "a pencil of otherwise ordinary construction." Have you correctly stated it? Is not the language, "a pencil of otherwise ordinary or suitable construction?" Have you not omitted the words "or suitable" which appear between the words "ordinary" and "construction" in the Exhibit No. 6?

A. The words which I have mentioned are taken verbatim from the patent, but do not comprehend the whole of the language which is found in connection.
59 Of course I have omitted the words "or suitable," which are found in the whole of the language of the patent; because I did not consider the words "or suitable" affected my mind in reference to the point enquired of in the 88th cross-question.

X Q. 90. If the attached tube mentioned in cross-question 85 were composed of a material not capable of being cut with a knife to expose fresh surfaces of rubber, would it not still constitute a receptacle for the eraser or other similar article referred to in Exhibit No. 6?

A. The attached tube would in such event constitute a receptacle for the eraser or other similar article.

X Q. 91. Would not the pencil with such attached tube in like manner taper towards its opposite end, and show a sheath of comparatively smaller size at the other end?

A. I understand that the 85th cross-question assumes that the pencil is to taper from an enlarged head where the ferule is situated, towards the other end in which the pencil-lead is contained, and according to this understanding the pencil with the attached tube assumed in the 90th cross-question would taper from the head towards its opposite end substantially as the article recited in the second claim of Exhibit No. 6 tapers. The sheath also would be, at the lead end, of comparatively smaller size than at the head.

X Q. 92. Would it not also equally admit of a crayon or lead of large size, or of any other article, in place of India *the* rubber?

A. As I understand the assumption contained in the cross-question 90, it would.

X Q. 93. Would not, then, such a pencil have all the elements and all the utility and operation shown in the pencil described and claimed in Exhibit No. 6, with the one exception that it would not have at the rubber end a wooden sheath or case for the rubber or other article?

A. It would not have a wooden sheath or case for the rubber,
60 and, consequently, the pencil would not have the property of permitting fresh portions of the rubber to be exposed by cutting away the wooden sheath for the rubber or other material.

In other respects than these the hypothetical pencil would have all the other elements, utility, and operation of the pencil described in Exhibit No. 6, and would be like the pencil described and claimed in all other respects than those I have just mentioned at the commencement of this answer.

X Q. 94. In your opinion, is any additional utility gained by the use of the paper tube shown in complainant's Exhibits Nos. 2, 3, and 4, beyond or which is not possessed by the pencil which is described and referred to in Exhibit No. 5; and, if so, what?

A. There is no additional utility as respects the purposes of the compound implement. But the use of paper material in the construction of the head or sheath enables the India rubber to be used of larger size without making the pencil clumsy, and, to this extent, improves the utility of the article.

X Q. 95. Is that the only improvement, in your opinion?

A. That is the only improvement as respects complainant's Exhibit No. 2. Complainant's Exhibits Nos. 3 and 4, by having an enlarged recessed head and a tapering form, enable a still larger piece of rubber to be used than is found in Exhibit No. 2 without rendering the articles cumbrous or clumsy to the user. These are the only improvements, in my opinion.

X Q. 96. If the sheath in these Exhibits Nos. 2, 3, and 4 were all of wood, and the pencils of the same size, could so large pieces of rubber as is shown in said exhibits be used without the surrounding wall of the wooden sheath being so weak as to render it practically of no value, or liable to be so?

A. If the sheaths in the exhibits were all of wood, and no larger in diameter than they now are, the presumption is that the walls of
61 the sheaths would be too weak for practical use if they were not thicker than the walls now are. Consequently, if the sheaths were to be of wood, and the India rubber of the same size that it now is, the walls of the sheaths would have to be enlarged in diameter, and the articles would be more cumbrous than they now are.

X Q. 97. Is not this increased strength gained directly by the properties of said artificially-prepared paper tubes, which admit of great thinness, and have, at the same time, great strength, and are not capable, in any event, of splitting, as wood is?

A. The increased strength is due to the fact that paper material is a stronger material than wood. When such paper material is made in the manner in which the tubular paper material heads of the Exhibits Nos. 2, 3, and 4 are made, it does not split lengthwise, as the wood of the sheaths or cases of ordinary pencils can be split.

X Q. 98. Could the same degree of strength be attained were the sheaths of said exhibits wood, otherwise than by increasing the thickness of the wooden wall?

A. No; not that I am aware of.

X Q. 99. Is this improved utility over the pencil shown in Exhibit No. 5 gained by the same or an equivalent device to that shown in Exhibit No. 6?

A. The improved utility of complainant's Exhibit No. 2, as compared with the pencil described in Exhibit No. 5, or, in other words, the capacity to use a large piece of rubber without making the article cumbrous, is obtained in a manner which is not an equivalent for what is described in Exhibit No. 6. The improved utility in complainant's Exhibits Nos. 3 and 4, as compared with the pencil described in Exhibit No. 5, is obtained by embodying in those Exhibits, Nos. 3 and 4, the improvements recited in complainant's Exhibit No. 6, and an additional feature, viz, the use of paper material for the enlarged head or sheath, which is not suggested or described in Exhibit No. 6.

62 X Q. 100. In Exhibits Nos. 5 and 6 are not the lead and eraser contained in the same continuous groove within the same holder simply enlarged for a portion of its length at one end for the reception of the eraser?

A. In both the exhibits the pencils are represented with the sheath or case made of the same material from end to end, so that the groove or socket in which the India rubber is contained, and the groove in which the lead is contained, coalesce at their adjacent ends, and in that sense might be said to constitute one groove from end to end, made larger at the part in which the India rubber is inserted.

X Q. 101. What language do you find in Exhibits Nos. 5 and 6 from which you derive the opinion that the attachment to an ordinary lead-pencil, or a lead-pencil made in the usual manner, of a separate tube holding the eraser, is covered by or included in it?

A. I do not find any language in Exhibits Nos. 5 and 6 from which I derive the opinion that the attachment to an ordinary lead-pencil, or a lead-pencil made in the usual way, of a separate tube constructed of every material and holding the eraser, is covered by or included in it; but I find language from which I derive the opinion that a pencil having a separate tube constructed of a material which can be cut away as wood can, to expose fresh surfaces of the eraser and holding such eraser, is covered by or included in such language as an equivalent for the thing described in the patent. As in several of my preceding answers I have referred to the language of the patents upon which I base my opinion, I do not deem it necessary to encumber the record by going over the same ground again. It may, however, be proper to state that in order that the improvements recited in Exhibit No. 6 may be embodied, the pencil must differ from an ordinary lead-pencil in the respect that its head must be larger than the other end of the pencil, (where the lead is,) and that the sheath or casing must taper.

63 X Q. 102. Were the sheath or holder of Exhibits Nos. 2, 3, and 4, in addition to the paper tube, composed entirely of the same material of prepared paper as the tubes are composed of, would it, in your opinion, be the equivalent of what is shown in Exhibit No. 5?

A. As I understand the assumption in the question, the hypothetical pencils are to be exactly like the Exhibits Nos. 2, 3, and 4, in all respects but one, viz, that the sheaths, instead of being composed partly of wood and partly of paper material, are to be composed of paper material throughout the whole length. In my opinion, pencils constructed in this manner would be equivalents of the pencil described and recited in Exhibit No. 5.

The cross-examination of this witness adjourned to Dec. 24th, 1872, at 11 a. m.

NEW YORK, *December 24th*, 1872—11 a. m.

Present, counsel for both parties.

The cross-examination of the witness, Edward S. Renwick, continued by Mr. Washburn.

X Q. 103. Please look at the pencil now shown you and state whether or not that is the pencil described and referred to in Exhibit No. 5?

(Pencil is marked "Defendant's Exhibit B.")

A. Upon examining said pencil, Exhibit B, I find that it is substantially in accordance with the combination, arrangement, and construction recited in the claim of Exhibit No. 5, although the India rubber is not as large in proportion to the size of the lead as the India rubber represented in the drawing of said Exhibit No. 5 is.

64 X Q. 104. Please look at the pencil now shown you in which the rubber is enclosed in a brass tube, and state if that pencil, in your opinion, is the equivalent of the thing described and claimed in Exhibit No. 6?

(Pencil marked "Defendant's Exhibit C.")

A. Upon examining the said Exhibit C, I find that is differs substantially from both of the improvements recited in the claims of the said patent Exhibit No. 6, and is not an equivalent of the thing recited in either of said claims.

X Q. 105. Give your reasons.

A. My reasons for said opinion are, that as I understand said patent Exhibit No. 6 an essential requirement of each of the improvements recited in the claims is, that the entire sheath, from end to end, shall be composed of wood or some material or materials that are the equivalent thereof, so that the sheath or case may be cut away at each end so as to expose fresh portions of the lead at the lead end of the pencil, and fresh portions of the India rubber or other article as required in the use of the pencil.

Now, Exhibit C, as far as my examination of it has extended, has a sheath composed in part of wood and in part of a hard metal which is not the equivalent of wood for the purpose of enabling fresh portions of the India rubber to be exposed for use by cutting away the surrounding sheath or case at the head end of the pencil, consequently the said compound sheath or case of Exhibit C is not the equivalent of the wooden sheath or case recited in each of the claims of the said patent Exhibit 6; and the said Exhibit C, composed in part of such non-equivalent sheath or case, is not the equivalent of the pencil recited in either of said claims.

X Q. 106. Were the pencil precisely the same as defendant's Exhibit C, with the exception of being cylindrical and of uniform size from end

to end, instead of being tapering, would you make the same answer with reference to such a pencil as compared with complainant's Exhibit No. 5, as you have made with reference to defendant's Exhibit C, as compared with complainant's Exhibit No. 6?

65

A. I should make the same answer in substance, varying the language only to conform with the fact that but one improvement is recited in the claim of Exhibit No. 5, while two are recited in the claims of Exhibit No. 6, and to conform to the fact that the case is called in Exhibit No. 6 a holder.

X Q. 107. Were the tube holding the rubber in Exhibit C and also in the hypothetical pencil, which would be precisely the same as that exhibit, with the exception of being cylindrical and of uniform size from end to end, instead of tapering, composed of a material capable of being cut with a knife, would you then say that said Exhibit C would be substantially the same as the thing described and claimed in Exhibit No. 6, and said hypothetical pencil substantially the same as the thing described and claimed in Exhibit No. 5?

A. If the pencils Exhibit C and the hypothetical cylindrical pencil had one end of the sheath formed by a tube, composed of a material which was the equivalent of wood, for the purpose of enabling fresh portions of the India rubber to be exposed for use by cutting away the said material, instead of having the one end formed as the said Exhibit C has, of a tube composed of a material which has not the same property, (which I understand to be the assumption of the question,) then I should say that one of the said two assumed pencils would be substantially the same as the pencil described and claimed in said Exhibit No. 5, and the other assumed pencil would be substantially the same as the pencil described and claimed in the said Exhibit No. 5, and in both claims of said Exhibit No. 6.

X Q. 108. Will you please state whether in Exhibit C, which is understood to be precisely the same in all respects as complainant's Exhibits Nos. 3 and 4, with the sole exception that the tube holding the eraser is of metal, if the tube holding the rubber were of a material capable of being cut with a knife, would that render said Exhibit substantially the same as the thing described and claimed in Exhibit No. 6?

66

A. I suppose the question is intended to assume that Exhibit C is to be changed, so that, instead of having a tube at the head end, composed of hard metal, as it now has, it has a tube composed of a material which can be cut, so as to enable fresh portions of the India rubber to be exposed for use. I should be of opinion that such changed exhibit would be substantially the same thing as is described and claimed in each of the claims of said Exhibit No. 6.

X Q. 109. Do you make the same answer with reference to the hypothetical cylindrical pencil in the 106th cross-question and complainant's Exhibit No. 5?

A. If the said hypothetical cylindrical pencil were changed in the same manner, I should say that the said changed hypothetical pencil would be substantially the same thing as is described and claimed in said Exhibit No. 5.

X Q. 110. Who made the cuttings which appear on the two Exhibits B and C?

A. I made the cuttings on Exhibit B, and also substantially all the cutting on Exhibit C, for the purpose of ascertaining their respective construction.

E. S. RENWICK.

Subscribed and sworn to this 24th day of December, A. D. 1872.

E. G. THOMPSON,
Examiner.

Examination adjourned to December 27th, 1872, at 11 A. M.

67 RECKENDORFER *vs.* FABER.

NEW YORK, *December* 27, 1872—11 a. m.

Present, counsel for both parties.

Mr. Wetmore, of counsel for complainant, offers in evidence certified copies of the assignments, from Lipman to Hoffman and Hoffman to Reckendorfer, of the extended patent Exhibit No. 5, which said assignments are marked respectively Exhibits Nos. 7 and 8. E. G. T., Exr.

Examination adjourned by consent to new notice.

RECKENDORFER *vs.* FABER.

NEW YORK, *Feb.* 7, 1873—11 a. m.

Adjourned to Feb. 12, 1873—11 a. m.

NEW YORK, *Feb.* 12, 1873—11 a. m.

Adjourned to Feb. 17, 1873, 11 a. m.

68 NEW YORK, *Feb.* 17, 1873—11 a. m.

Present, counsel for both parties.

Henry B. Renwick, being produced as a witness on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and profession?

A. Henry B. Renwick; I am 55 years of age; I reside at 29 Park avenue, New York; I am by profession a civil and mechanical engineer, and am frequently examined as expert in the circuit court of the United States in cases where patents are involved.

Q. 2. Have you read, and do you understand, the specifications of the plaintiff's patents, Exhibits Nos. 5 and 6, which are herewith produced and placed in your hands?

A. I have read them both, and believe that I understand them.

Q. 3. Please examine the lead-pencils herewith produced and exhibited to you, being the plaintiff's Exhibits Nos. 2, 3, and 4, alleged to be the manufacture of the defendant, and state your opinion as an expert in regard to the identity of those articles with the articles described and referred to in the specifications and claims in the patents referred to in your last answer.

(Counsel for defendant objects so far as the answer of the witness is his construction, or founded upon his construction, of the letters-patents, and the specifications and claims annexed.)

A. I have examined the lead-pencils handed me, and marked "Exhibits Nos. 2, 3, and 4," and believe that all of them contain the invention described and specified in the patent granted to Lipman, Exhibit No. 5.

69 That patent describes a pencil composed of lead, of wood, and of India rubber; the lead and India rubber being contained in the groove or bore of the pencil; the lead, as usual, appearing at one end of the pencil, and the rubber being so applied that it shall appear at the other end. It is stated in the patent that, owing to this construction, the India rubber may have new portions of its surface exposed by cutting away the wood in a manner similar to the sharpening of an ordinary pencil.

All the exhibits have a sheath or case with a groove in it; have rubber contained in the groove or bore and appearing at one end of the pencil, and lead at the other, and the sheath or case of the pencil is, in all of them, made of such material that it can be cut with a knife, so that fresh portions of either the lead or the India rubber may be exposed by cutting away part of the case. In the pencil-exhibits the cases are not made wholly of wood, but partially of wood and partially of a material which appears to be paper, or papier-maché, composed of vegetable fibre.

In my opinion, this material is the equivalent of the wood described in the Lipman patent; supports the India rubber in the same manner and at the same place in the pencil, as a whole, and can be cut with a knife so as to expose fresh portions of the rubber, when necessary.

The pencils, Exhibits Nos. 3 and 4, contain the invention described and specified in the claims in Exhibit No. 6, which is a patent granted to Reckendorfer. The patent of Reckendorfer, as I understand it, describes, among other things, an improvement upon that granted to Lipman. It describes the wooden case, the lead supported in a groove at one end thereof, and the rubber supported in a similar way at the other end. The improvement consists in making the case of the pencil tapering from the end containing the rubber to that containing the lead, and making the groove for the rubber larger than that which
70 contains the lead. By the use of this improvement, a piece of rubber of larger diameter or transverse section can be used than is possible when the pencil is made in exact accordance with the Lipman patent, and at the same time is supported sufficiently firm, while the pencil is not inconveniently increased in size at the point where it is usually grasped by the hand. These pencil-exhibits, Nos. 3 and 4, differ from the precise construction of the pencil described in the Reckendorfer patent only in the fact that paper, or papier-maché, forms part of the case, and I have before stated that I consider this papier-maché as an equivalent for the wood in the case or sheath of a pencil.

And being cross-examined by Mr. Washburn, says:

X Q. 1. You are the brother of E. S. Renwick, who has already been examined in this case as an expert, are you not?

A. I am.

X Q. 2. Have you read the testimony of said E. S. Renwick in this suit?

A. I have.

X Q. 3. Do you agree with it in all respects?

A. I can't tell you whether I do or not; I do not remember having read the whole of it, although I may have; and I read it cursorily, and cannot remember, except very generally, what his views are, as therein expressed.

X Q. 4. Please answer the question with reference to such and all of the knowledge that you have of his testimony.

A. I remember that he expresses the view that the pencil-exhibits contain the inventions specified in the patents; also, that he thinks

the papier-maché is the equivalent of wood; also, that a metal tube applied on the end of a wooden case of an ordinary pencil, said tube containing and supporting rubber, would not be the pencil de-
71 scribed in either of the patents; and, if I remember rightly, also that an ordinary lead-pencil, with a ferule of rubber slipped over its end, would not be the same as the pencil described in the patents. On all these points, which are the only ones that I can call to memory, I agree with him.

X Q. 5. Do you disagree with him in any respect, as to any matters as to which he so testified, and of which you have knowledge?

A. I have already stated that I agree with him in all the points which I can remember. I do not disagree with him on any point which I can remember.

X Q. 6. In your opinion, is the pencil described and shown in the Lipman patent, Exhibit No. 5, limited to any particular method of construction?

A. If I understand the question right, it is. It is not necessary that it should be made by any special tools or by any special process of construction.

X Q. 7. How do you understand the question?

A. I understand the question to ask me, whether the patent covers any pencil which is not constructed substantially in the manner described in that patent; that is to say, with a wooden case provided with a groove or bore, with rubber enclosed in one end of the groove and lead in the other. The patent is limited to this method of construction, or, as I should phrase it, to this construction of a pencil as a whole.

X Q. 8. The X Q. 6 was directed to the method of construction of the pencil to which the rubber is applied, as stated therein, and not to the whole article alleged to be the invention. Please now answer the same.

A. The patent is limited to a peculiar construction of what I understood your question to denominate the pencil, viz, the lead and the sheath. It must have a sheath made of wood as usual, and provided with a bore in one end of which the lead is located, and the other end of which is fitted to receive the India rubber.

72 X Q. 9. In your opinion is the pencil mentioned in the Lipman patent, Exhibit No. 5, limited to an ordinary lead-pencil made in the usual manner?

A. I understand you to mean the pencil without the eraser. It is not limited to any ordinary lead-pencil made in the usual manner. In an ordinary lead-pencil the lead usually fills the groove from end to end of a pencil, and in those cases when it does not the bore or groove does not continue through the pencil. Before the rubber is put into the Lipman pencil there exists an unfilled groove ready for its reception, and I do not know of any ordinary pencil so constructed.

X Q. 10. Have you stated the only difference, in your opinion?

A. I have, so long as the rubber is left out of the question.

X Q. 11. Then do you mean to be understood that it is limited to an ordinary lead-pencil made in the usual manner, with the only difference that the portion of the groove or bore, which is used as the receptacle of the eraser, does not contain lead?

A. I do, to that or a substantial equivalent.

X Q. 12. When was your attention first called to these patents, Exhibits Nos. 5 and 6, and the inventions alleged in them?

A. Some months ago. I cannot exactly remember when.

X Q. 13. By whom?

A. Mr. Keller, I think. It may have been Mr. Blake.

X Q. 14. Was it so called with reference to your being an expert witness in this case?

A. I do not remember being told what the case was, and am usually not told, but it was with reference to some suit, either brought or to be brought, under these patents.

X Q. 15. Please look at defendant's exhibit C, assuming it to be made and to be precisely like the pencil-exhibits, Nos. 3 and 4,
73 with the exception only that the tube is of brass instead of paper, and state if it is, in your opinion, the equivalent of the thing described and claimed in Exhibit No. 6.

A. It is not.

X Q. 16. Why?

A. Because the material which encloses and supports the India rubber, and combines it in one article with the lead, is not capable of being cut so as to expose fresh surfaces of India rubber.

X Q. 17. Suppose a pencil-eraser precisely the same as defendant's Exhibit C, with the exception only of being cylindrical and of uniform size from end to end instead of being tapering; in other words, precisely like complainant's exhibit No. 2, with the exception only of rubber being enclosed in a brass instead of a paper tube, would you make the same answers with reference to such a pencil as compared with complainant's exhibit No. 5, as you have just made with reference to defendant's exhibit C, as compared with exhibit No. 6?

A. I would.

HENRY B. RENWICK.

Subscribed and sworn to this 17th day of Feb., 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned by consent to new notice.

Complainant's exhibit No. 5.—E. G. T., examiner.

The U. S. Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the rec-
74 ords of this office, of the letters-patent granted Hymen L. Lipman, dated March 30th, 1858, No. 19,783, for combination of lead-pencil and eraser.

In testimony whereof I, Samuel A. Duncan, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

{ SEAL OF THE PATENT-OFFICE. }

SAML. A. DUNCAN,
Acting Commissioner.

No. 19,783.

The United States of America to all to whom these letters-patent shall come:

Whereas Hymen L. Lipman, of Philadelphia, Pennsylvania, has alleged that he has invented a new and useful combination of lead-pencil and eraser, which he states has not been known or used before his

application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said combination, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said combination, and praying that a patent may be granted for that purpose: These are, therefore, to grant, according to law, to the said Hymen L. Lipman, his heirs, administrators, or assigns, for the term of fourteen years from the thirtieth day of March, one thousand eight hundred and fifty-eight, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said combination, a description
75 whereof is given in the words of the said Hymen L. Lipman, in the schedule hereunto annexed, and is made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent-Office has been hereunto affixed. Given under my hand, at the city of Washington, this thirtieth day of March, in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States of America the eighty-second.

[SEAL OF THE PATENT-OFFICE.] JACOB THOMPSON,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent-Office.

J. HOLT,
Commissioner of Patents.

The schedule referred to in the letters-patent and making part of the same.

To all whom it may concern:

Be it known that I, Hymen L. Lipman, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented a new and useful lead pencil and eraser; and I do hereby declare the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing and to the letters of reference marked thereon.

I make a lead pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, A, and insert in this groove a piece of prepared India rubber (or other erasive substance,) secured to said pencil by being glued at one edge; the pencil is then finished in the usual manner, so that on cutting one end thereof you have the lead, B, and on cutting at the other end you expose a
76 small piece of India rubber, C, ready for use, and particularly valuable for removing or erasing lines, figures, etc., and not subject to be soiled, or mislaid on the table or desk.

In making mathematical, architectural, and many other kinds of drawings, in which the lines are very near each other, the eraser is particularly useful as it may be sharpened to a point to erase any marks between the lines, and should the point of the rubber become soiled or inoperative from any cause, such cause is easily removed by a renewed sharpening as in the ordinary lead pencil. I do not claim the use of a lead pencil with a piece of India rubber, or other erasing material, attached at one end for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by letters-patent, is the combination

of the lead and India rubber, or other erasing substance, in the holder of a drawing pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth.

HYMEN L. LIPMAN.

Witnesses:
LEWIS A. LIPMAN,
JOHN P. CHARLTON.

Certificate of extension.

Whereas, upon the petition of Hymen L. Lipman, of Philadelphia, Pennsylvania, for the extension of the patent granted to him March 30, 1858, for "combination of lead pencil and eraser," the undersigned, in accordance with the act of Congress approved the 8th day of July, 1870, entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights," did, on this twenty-fifth day of March, 1872, decide that said patent ought to be extended:

77 Now, therefore, I, Mortimer D. Leggett, Commissioner of Patents, by virtue of the power vested in me by said act of Congress, do renew and extend the said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, viz, from the thirtieth day of March, 1872; which certificate being duly entered of record of the Patent-Office, the said patent has now the same effect in law as though the same had been originally granted for the term of twenty-one years. And it is hereby ordered that this certificate of extension be entered on a certified copy of said patent.

In testimony whereof, I have caused the seal of the Patent-Office to be hereunto affixed this twenty-fifth day of March, 1872, and of the Independence of the United States the ninety-sixth.

[SEAL OF THE PATENT-OFFICE.] M. D. LEGGETT,
Commissioner.

Re-issue No. 3863.

Complainant's exhibit No. 6.—E. G. T., examiner, Nov. 25, 1872.

The United States of America to all to whom these letters-patent shall come:

Whereas Joseph Reckendorfer, of New York, New York, has alleged that he has invented a new and useful improvement in pencils, (for which letters-patent were issued to him, dated November 4, 1862, which letters having been surrendered, the same have been cancelled, and new letters ordered to issue to him on an amended specification,) and has made oath that he is a citizen of the United States; that he verily be-

78 lieves he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor:

These are therefore to grant to the said Joseph Reckendorfer, his executors, administrators, or assigns, for the term of seventeen years from the fourth day of November, one thousand eight hundred and sixty-tow, the full and exclusive right and liberty of making, using, and vending

to others to be used, the said improvement, a description whereof is given in the annexed schedule, and made a part of these presents.

In testimony whereof, I have caused these letters to be made patent and the seal of the Patent-Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first day of March, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

[SEAL OF THE PATENT-OFFICE.]

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent-Office.

SAMUEL S. FISHER,
Commissioner of Patents.

79 UNITED STATES PATENT-OFFICE.

Joseph Reckendorfer, of New York, New York. Letters-patent No. 36854, dated November 4, 1862; re-issue No. 3863, dated March 1, 1870. Improvements in pencils.

The schedule referred to in these letters-patent and making part of the same.

To all whom it may concern:

Be it known that I, Joseph Reckendorfer, of New York, in the county and State of New York, have invented a certain new and improved pencil; and I hereby declare the following is a full and exact description of the same, reference being had to the accompanying drawings, in which—

Figure 1 is a side view of a pencil made in accordance with my invention;

Figure 2, a longitudinal section;

Figure 3, a cross-section on the line S S; and

Figure 4, a cross-section on the line Z Z.

My invention is intended to provide a means whereby articles of greater size or diameter than the lead may be securely held in the head of a pencil of otherwise ordinary or suitable construction, without making the body of the pencil cumbrous or inconvenient. To this end, my invention consists—

First, of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed, to constitute a receptacle for an eraser or other similar article, as hereinafter stated.

Second, of a pencil, the wooden case of which gradually tapers from the enlarged and recessed head toward its opposite end for the whole or a portion of the length, as hereinafter set forth.

80 The receptacle for the eraser or other article is formed in the head without too much weakening the wood, owing to the form of the sheath, while, for the same reason, the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers just as an ordinary pencil is.

In the drawings—

A is the wood casing of the pencil, made in two parts and glued together in the ordinary manner, but made larger at one end than at the other, as represented.

This casing is grooved out with a small groove for the reception of the black-lead or plumbago, B, as usual, but for only a portion of its length.

The remainder at the larger end, has a much larger groove or recess, in which the India rubber, C, or other similar article to be therein held, is placed as represented.

Pencils of equal size throughout have been heretofore made with a slip of rubber fitted in in place of the lead at one end, but such pencils have not become of any considerable practicable importance, in consequence of the smallness of the rubber, and it has been held impracticable to make the rubber much larger without too much weakening the wood or making the entire pencil thick and awkward to handle.

By my invention the size of the rubber may be so increased, while that of the lead remains the same as to render it a very effective eraser, the size of the pencil-head being such as to render it a convenient receptacle for a rubber of much more considerable size or diameter than the lead.

In preparing the wood portions of my pencils, I prefer to saw the material into tapering slips, lying alternately with the ends in opposite directions and afterward reduce these pieces to the required form, thus economizing material as far as possible.

I make the exterior of my improved pencil of a round, square, hexagonal, octagonal, oval, or other section as may be desired, and
81 finish it in any style, but always make the head of a larger diameter than the opposite end.

The lead and rubber may also be of any desired section, and may be also tapered, if preferred, but the rubber should always be the larger, and I prefer the uniform section of each, as represented.

Any other erasive material may be substituted for the rubber, C, without effecting the character of my invention, or a crayon or lead of a different color or quality may be substituted therefor if desired. Crayons and the softer qualities of lead require a larger section than that given to the part B, and the enlarged head of the pencil will receive them equally as well as the rubber.

What I claim as new, and desire to secure by letters patent is—

1. A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth.

2. A pencil, the wooden case of which gradually tapers from its enlarged and recessed head toward its opposite end, for the whole or a portion of its length, substantially as shown and described.

In testimony whereof I have hereunto affixed my hand this 24th day of December, 1869, before two subscribing witnesses.

JOS. RECKENDORFER.

Witnesses:
A. M. BARKER.
GEO. M. KING.

82 *Complainant's exhibit No. 7.—E. G. T., examiner.*

The United States Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office.

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed this second day of December, in the year of our Lord one thousand

eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL OF PATENT-OFFICE.] J. M. THACHER,
Acting Commissioner.

Whereas I, Hyman L. Lipman, of Philadelphia, Pennsylvania, am the first and original inventor of certain combination of pencil and eraser, for which letters-patent of the United States were issued to me March 30th, 1858; and

Whereas said patent has been extended to me for another term of seven years from and after the 30th March, 1872;

And whereas I, the said Lipman, have agreed to sell all the right, title, and interest in and to the said patent, under the extended term thereof, to James H. Hoffman, of New York, for two hundred dollars in cash and thirty-five thousand dollars in the capital stock in the Universal Hat Company;

83 And whereas the said Hoffman has paid to me said amount of two hundred dollars and transferred to me three hundred and fifty shares, of the par value of one hundred dollars each, of the Universal Hat Company, the receipt of all of which by me, the said Lipman, is hereby duly acknowledged:

Now, therefore, this indenture witnesseth that, for and in consideration of these premises, I have assigned, sold, and transferred, and hereby assign, sell, and transfer, unto said James H. Hoffman, his assigns, and legal representatives, all the right, title, and interest which I have, or may have, in said patent, and any extension thereof.

And I hereby covenant that I have a good and valid right to sell the same, and I also agree to make out, sign, and execute any paper or papers that are or may be needed for the more effectual carrying out of this sale and transfer; and I also agree, should the same become necessary, to apply for a re-issue of said patent; and that the expense of said Hoffman, his assignee, or legal representative, to do all that may be deemed advisable to protect said Hoffman, his assignees, or legal representatives, in full enjoyment of the rights hereby conveyed.

In testimony whereof I have hereunto set my hand and affixed my seal this 30th day of March, 1872.

HYMEN L. LIPMAN. [L. S.]

[5-cent stamp canceled.]

Sealed and delivered in presence of—
ISAAC HIRSCH,
ALEX. BUCHANAN.

Recorded April 1st, 1872.
Examined: F. S. K.

Complainant's exhibit No. 8.—E. G. T., examiner.

Whereas, by an instrument in writing, duly recorded in liber
84 J[15], page 106, of the records of transfers of patents, in the United States Patent-Office, Hymen L. Lipman did assign unto me, James H. Hoffman, of the city, county, and State of New York, all his, the said Lipman's, right, title, and interest in letters-patent No. 19783, for combined pencil and eraser, dated March 30, 1858, and extended for a further term of seven years from March 30, 1872, which assignment included said extended term; and whereas, Joseph Recken-

dorfer, of New York City, is desirous of acquiring an interest in the same: Now, therefore, I, the said James H. Hoffman, in consideration of one dollar and other valuable considerations, to me in hand paid by the said Joseph Reckendorfer, receipt whereof is hereby acknowledged, have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Joseph Reckendorfer, all my right, title, and interest in and to said extended letters-patent, the same to be held and enjoyed by the said Joseph Reckendorfer for his own use and behoof, and for the use and behoof of his heirs, executors, and legal representatives, to the full end of the term for which said letters-patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof, I have hereunto set my hand and affixed my seal this 16th day of May, A. D. 1872.

JAMES H. HOFFMAN. [L. S.]

[5-cent U. S. rev. stamp, canceled.]

Sealed and delivered in presence of—
EDMUND WETMORE.

Recorded June 5, 1872.
Examined: F. S. K.

85 United States circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

It is agreed that the testimony to be taken at Camden, Lincolnville, Thomaston, Rockland, Boston, and Hope, may be taken before E. G. Thompson, esq., examiner.

New York, May 28th, 1873.

KELLER & BLAKE.
JOHN S. WASHBURN.

United States circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Upon reading and filing the hereto-annexed consent of counsel herein, it is hereby ordered that Edward G. Thompson, esq., one of the examiners of this court, be, and he hereby is, appointed special examiner, to take the testimony of witnesses in the above-entitled suit, at
86 the towns of Camden, Lincolnville, Thomaston, Rockland, and Hope, in the State of Maine, and at the city of Boston, in the State of Massachusetts.

And further, that the said Thompson, as such special examiner, have power to take with him such of the exhibits herein as counsel may desire.

SAMUEL BLATCHFORD.

A copy:

KENNETH G. WHITE, *Clerk.*

U. S. circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Proofs for final hearing on the part of the complainant, taken before Edward G. Thompson, as special examiner, by consent of counsel and order of this court, under and pursuant to the 67th rule in equity, as amended.

CAMDEN, MAINE, *June* 4, 1873 9.30 a. m.

Present, Chas. F. Blake and E. Wetmore, of counsel for complainant, and P. Thacher of counsel for defendant.

MARY J. CURTIS, a witness produced on the part of the complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, residence, and occupation?

87 A. Mary J. Curtis. I reside at Camden, Maine. I have been a telegraph operator at the office in Camden, Maine.

Q. 2. Did you operate the Camden office on the 2d of May last?

A. Yes, sir.

Q. 3. Did you, on that day, send a dispatch to Peter Thacher, esq., at Boston?

A. Yes, sir; I did.

Q. 4. Have you a copy of that dispatch? and if so, please produce it.

A. I have, and I here produce it.

(Counsel for complainant offers the copy produced in evidence, marked "Complainant's Exhibit Curtis No. 1, E. G. T., S. E."

Counsel for defendant objects to the 4th interrogatory, as calling for a privileged communication, and as irrevelant, and as inadmissible in itself; also to the 3d interrogatory, as calling for privileged matter and as irrevelant.)

And being cross-examined, de bene esse, by Mr. Thacher, says:

X Q. 5. Who, and at what time, made inquiry of you touching any such communication?

A. I do not know; Mr. Illfelder; I can't tell you when it was.

X Q. 6. State, according to your best recollection, when it was.

A. I think it was last Saturday.

X Q. 7. Did you then disclose the communication to him?

A. No, sir.

X Q. 8. When did you disclose it, and to whom?

A. I did not disclose it to any one; I brought the message here this morning.

X Q. 9. At whose request did you make the copy which you have produced, that you say is a copy?

A. The United States court.

88 X Q. 10. What do you mean by that?

A. I was summoned here by a subpœna.

X Q. 11. Had you not conversation with some one about making such copy and producing it, previously or at that time; and if so, with whom?

A. Mr. Illfelder brought me this summons, and I asked him if I should bring a copy of this message.

X Q. 12. Is Mr. Illfelder the gentleman here present?

A. Yes, sir.

X Q. 13. Did you not disclose to Mr. Illfelder the nature of the communication?

A. No, sir; I did not.

X Q. 14. To whom did you disclose it?

A. To no one.

X Q. 15. How many times did Mr. Illfelder talk with you about it?

A. I don't know that he did more than once.

X Q. 16. Did you not tell him that Mr. Dunton had sent a telegram?

A. No, sir; I did not.

MARY J. CURTIS.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

WILLIAM H. HODGES, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. William H. Hodges. I am 44 years of age. I reside in Lincolnville, Maine. I am a farmer and teacher. I teach most of the time.

Q. 2. Is Lincolnville in Waldo County, and how far is it from the town of Camden; and have you been register of deeds for that town or county?

89 A. It is. It is about seven miles from Camdentown. I have not been the register, but I was clerk in the office of the register of deeds of that county for about five years.

Q. 3. How long have you resided in Lincolnville?

A. Twenty-one years last September since I came to the town.

Q. 4. Do you know Mr. Alvin R. Dunton, a writing-master, who has taught in this vicinity?

A. I do.

Q. 5. Do you remember of his having taught a writing-school in the town of Lincolnville, or Lincolnville Center, at any time between the dates of 1854 and 1859; and if yea, will you please state at what date he so taught, and how you are enabled to fix that date?

A. I do, sir. I cannot fix the exact day, but the date was in the fall or forepart of the winter of 1857. It was immediately prior to my teaching school in district No. 7, in the same town. After I closed my school in that district, I went to Belfast, as clerk in the register of deeds' office. The register of deeds was elected in the fall of 1857, and expected to take his seat the 1st of January, and that would be the 1st of January, 1858. Instead of that, he did not commence to act as register of deeds till April, owing to some informality in the laws of the State, and owing to the decision of the commissioners of the county of Waldo. I went there, however, myself, the last of February or the 1st of March, before he took the office. This is one reason I am positive in regard to the time. In the winter of 1855–'6, V. R. Lancaster bought the public house at the Center, and in the winter of 1856–'7 Martin Townsend kept the public house. In the spring of 1857 they sold to James Holt, of Belfast. During that summer I was clerk for V. R. Lancaster, in his store at Lincolnville. That fall I boarded with James Holt, and taught a private school at the Center, and the last part of my teaching that fall at the Center I attended a writing-school kept by A. R. Dunton. My private school extended till the 1st of January, I think. I mean the 1st of January, 1858.

90 Q. 6. What was the name of the register of deeds whose election you have referred to?

A. John F. Milliken.

Q. 7. You taught, if I understand you, in two different schools—one the district school No. 7, and the other your own private school; is this so?

A. It is.

Q. 8. Did Mr. Dunton have any assistants in his school at the time you have referred to; and, if so, who were they?

A. He did. His wife assisted him, and it was sometimes the case that she conducted the school at the Center wholly, he not being present, having another school at Hope, called Hope Corner, at the same time. There was another person with him at the time, whom I do not know whether to call a scholar or an assistant. His name was Mr. Thomas—I think his name was Silas Thomas—belonging in the town of Camden.

Q. 9. Did Mr. Dunton teach a writing-school at Lincolnville, while you were living there, at any other time than the fall or winter of 1857, as you have already testified?

A. Not to my knowledge.

Q. 10. What opportunities did you have for knowing if he had so taught while you were living there?

A. From the fact that I have been at the Corner, or in that vicinity most of the time for over twenty years, with the exception of the time when I was in Belfast, and then nearly every two weeks I was at the Center, and spent my Sundays and Saturdays there; and if he had taught writing at that place I should have been very apt to have known it.

And being cross-examined by Mr. Thacher, says:

X Q. 11. What do you mean by the Corner?

A. I mean Lincolnville Center, what is known and called Lincolnville Center.

X Q. 12. Is there not another larger village in Lincolnville called French's Beach; and what is the distance from Lincolnville Center or Corner thither?

A. There is; and we call it five miles from the Center to the Beach.

91 X Q. 13. What is the extent of the town of Lincolnville?

A. I could hardly tell; but it is somewhere in the vicinity of six miles one way, and seven the other. It is not a square town.

X Q. 14. Please state the relative situation of the two villages, as to sea-coast and interior.

A. French's Beach lies upon the bay; the Center lies back, in the back part of the town nearly five miles from there, very near what is called the head of Norton Pond.

X Q. 15. Outside of the villages of French's Beach and Lincolnville Center are there not considerable settlements and cultivated farms upon the different roads in the town?

A. No more than in any common farming community, as a general thing.

X Q. 16. Question repeated.

A. Of course there are many farms, but I do not know as there is any what you might call thickly settled places outside of those two villages.

X Q. 17. Do you know the year when A. R. Dunton married his second wife?

A. I do not. I know nothing about his family matters.

X Q. 18. Did you not see him with his wife in Lincolnville or vicinity in the year 1855?

A. Not to my knowledge.

X Q. 19. Did you attend Teachers' Institute, in Belfast, in the year 1856?

A. I did not, but I did in 1857; but not in 1856.

X Q. 20. Do you recollect Gov. Boutwell, then secretary of the board of education of Massachusetts, being present at Belfast at the Teachers' Institute in 1856?

A. I do not.

X Q. 21. Did you not know of A. R. Dunton and wife teaching at Belfast in 1856?

A. I did not.

X Q. 22. Or being there?

A. I did not.

92 And being further examined on the redirect, he says:

Re-D. Q. 23. During the time of your residence in Lincolnville, do you know of Mr. Dunton's having taught a writing-school, except as you have already testified, at any place within the limits of the town of Lincolnville, either at French's Beach or in the farm-houses through the township, or in any other place within those limits?

(Objected to as going over the same ground already gone over.)

A. I never did.

WM. H. HODGES.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

WILLIAM R. MATTHEWS, a witness produced on the part of the complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. William R. Matthews. I am fifty-four years of age. I reside in Belfast, Maine, at present. I am keeping a boarding-house.

Q. 2. Did you formerly reside at Lincolnville; and, if so, in what part of the town, and during what period?

A. I did. I have resided at Lincolnville Center since 1857, until within two weeks.

Q. 3. You heard the testimony of Mr. Hodges, who has just testified?

A. I did, sir.

Q. 4. You remember the occasion when Mr. and Mrs. Dunton taught the writing-school at Lincolnville Center, referred to by Mr. Hodges; and, if so, will you please state the date when they were so teaching, and how you fix it?

A. He taught there in November, 1857. I fix it from the fact
93 that that was the fall I bought my house there, and moved there from another place in Lincolnville, where I was born and brought up.

Q. 5. Do you know Silas C. Thomas, formerly of the town of Camden, and, if yea, please state whether he accompanied Mr. Dunton on the occasion referred to, and how you remember it.

A. I do. He did, sir. He was Mr. Dunton's assistant, as well as Mr. Dunton's wife. Mr. Thomas boarded at my house. Mr. Thomas and

Mrs. Dunton used to conduct the school together occasionally, when Mr. Dunton was away at another school.

Q. 6. Did you ever know of Mr. A. R. Dunton's teaching a writing-school within the limits of the town of Lincolnville, at any other time than the occasion you have already testified to, from 1854 to the present time?

A. Not in Lincolnville. I have not known of his teaching, other than I have referred to, in that time; in other towns I have.

And being cross-examined by Mr. Thacher, says:

X Q. 7. Please to state whether you have not previously seen Mrs. Dunton, with her husband, in Lincolnville; and, if so, when?

A. I have previously to that time; it was in October or November, 1855. I would not be positive as to the month.

X Q. 8. Was not that shortly after their marriage?

A. I am under the impression that it was; it was the first time that I had ever seen his wife.

X Q. 9. Do you not know that they were about, in the county of Waldo, teaching in 1856?

A. I do not.

And being further examined on the redirect, says:

Re-D. Q. 10. Have you seen Mr. A. R. Dunton this morning?

A. I have.

WM. R. MATTHEWS.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

94 WILLIAM R. MATTHEWS, being produced again by counsel for complainant, he is notified that he must not converse with Mrs. Barbour, nor in her presence, in regard to any matters connected with this suit or her testimony before she testifies; and that if he fails to obey this direction, a motion will be made for an attachment against him.

The examination of witnesses is adjourned to the house of Mrs. Barber, a witness too ill to attend at the present place of examination.

Mrs. SARAH L. BARBOUR, a witness produced on the part of the complainant, having been duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. Where do you reside?

A. At Camden, Maine.

Q. 2. You are, I believe, the eldest daughter of Mrs. Rachel B. Thomas?

A. Yes, sir.

Q. 3. And the sister of Silas C. Thomas?

A. Yes, sir.

Q. 4. And you were the first of her daughters to be married?

A. Yes, sir.

Q. 5. What was your husband's pursuit?

A. Following the sea—sea-captain.

Q. 6. In what month and year were you married?

A. The 20th of August, 1855.

Q. 7. Did your husband afterwards go on a voyage to Constantinople, and when?

A. He did; he sailed from Boston on the 1st of November following.

Q. 8. When did he return from that voyage?

A. He returned the next spring. He was gone about six months from home.

Q. 9. Where did you spend Thanksgiving in the year 1855?

A. Here, at my father's.

Q. 10. Where did you spend Thanksgiving in 1856?

A. At home, here.

95 Q. 11. Who were there on Thanksgiving, 1856?

A. Mr. Dunton and his wife, and all the family, except one brother.

Q. 12. Had Mrs. Dunton been making you a visit here at that time; and, if so, for how long?

A. She had; she was here for two or three weeks.

Q. 13. Do you know where Mr. Dunton was during her visit; and, if so, where?

A. She came from Belfast here, while she was here for two or three weeks, and he came here. I don't remember how long he stayed.

Q. 14. When did you next see Mr. Dunton here?

A. Next fall—1857.

Q. 15. Do you know where he went from here, and what he did?

A. He was teaching at Rockland, Hope, and Lincolnville.

Q. 16. Was your brother, Silas C. Thomas, with him at that time?

A. He was.

Q. 17. Who was at your Thanksgiving in 1855?

A. I don't think we had any Thanksgiving, any more than our family.

Q. 18. Do you remember a visit Mr. Dunton made here about last February?

A. I couldn't say.

Q. 19. Do you remember a visit Mr. Dunton made here some months ago, when he came on a Friday and left on Monday?

A. He came on Saturday and left on Tuesday.

Q. 20. Were you staying here at home at the time?

A. I was.

Q. 21. Did he say anything to you about a pencil having a rubber at one end and lead at the other?

A. He did not.

Q. 22. How long had he been here before he spoke about it to your mother?

(Objected to as leading.)

A. I don't know of his saying anything about it before Monday evening.

96 Q. 23. Is this a correct plan of a part of the floor of this house?

(Plan shown witness, and marked "Complainant's exhibit Barbour No. 1, E. G. T., S. E.")

A. It is.

Q. 24. In which of these rooms did Mr. Dunton sleep?

A. The room marked "spare bed-room."

Q. 25. Have you heard anything about a pencil found in a bureau while Mr. Dunton was here?

A. Mother told me that she found one there.

Q. 26. In which room was the bureau where this pencil was found?

A. In the room next to the room marked "spare bed-room," marked "bed-room."

Q. 27. Was Mr. Dunton here during the year 1855, to your recollection?

A. Not to my knowledge.

Q. 28. How frequently have you seen Mr. Dunton in the last six weeks?

A. I have seen him quite often—nearly every day for the last two weeks.

Q. 29. What has been the principal topic of his conversation with you, if any?

(Objected to as irrelevant and incompetent.

A. Generally in regard to the pencil affair.

Q. 30. Do you remember anything that he has said in particular, and how many times he has said it, if there is anything?

(Objected to as irrelevant and incompetent.)

A. No, sir; nothing particular.

And being cross-examined by Mr. Thacher, says:

X Q. 31. Mr. Dunton has been residing in Camden, has he not, for some six weeks past?

A. He has.

97 X Q. 32. You live between where he lives and the village, do you not?

A. Yes, sir.

X Q. 33. I suppose, Mrs. Barbour, you do not mean to swear that Mrs. Dunton and her husband were not here in 1855, do you?

A. They were not here, to my knowledge. I have no recollection of it at all.

X Q. 34. Is not, then, that as far as you mean to go, that you don't recollect it at all?

A. That is all I can do.

X Q. 35. On the visit of Mr. Dunton to your mother's, when you say he came on Saturday morning and left on Tuesday evening, were you present all the time, between Saturday morning and Tuesday evening, when he was in company with your mother—every minute?

A. I was not.

X Q. 36. Do you know what gentleman has been here attending to this case on the side of the complainant?

A. I do not.

X Q. 37. Do you know Mr. Illfelder, now present?

A. Yes, sir.

X Q. 38. How long have you known him?

A. I became acquainted with him about the last of April or first of May.

X Q. 39. How many times did he call to see you at that time, when he was here then?

A. I think he called every day, in company with my brother.

X Q. 40. How long was he here at that time in Camden?

A. He was here a week, I think.

X Q. 41. How long has he been here now?

A. A week to-morrow morning, I think, since he arrived here.

X Q. 42. When did he first call on you this time, and mention about your testifying in this case?

A. He called on Friday evening. He did not mention anything about it.

X Q. 43. When did he first talk to you this time about this matter?

98 A. He spoke of it on Sunday; but he did not speak of my testifying or giving any testimony.

X Q. 44. When did he first introduce the subject of your testifying to you?

A. On Monday morning.

X Q. 45. Did Mr. Illfelder take you out to drive yesterday?

A. He did.

X Q. 46. How many times previously has he taken you out to drive?

A. Twice.

And being further examined on the redirect, says:

Re-D. Q. 47. You were subpœnaed to testify, were you not?

A. I was.

And being further cross-examined, says:

Re-x-Q. 48. When?

A. Last evening.

SARAH L. BARBOUR.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

EDWIN SPRAGUE, a witness produced on the part of the complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. Edwin Sprague; I am thirty-nine years of age; I reside at Rockland, Maine. I am an editor.

Q. 2. Are you the editor of the United States Democrat, a newspaper published at Rockland, Maine, or of a newspaper succeeding that publication? And will you please state, if you know, whether that
90 newspaper was published in Rockland during the year 1858, and under what name?

A. I am; it was, and under the name of the United States Democrat.

Q. 3. Have you in your possession, and, if yea, will you please produce, the file of that newspaper for the year 1858?

A. I have, and produce it here.

Q. 4. Will you please look at the issue of said paper of the date of January 20, 1858, and also of January 27, 1858, and state whether you find, in the first of those issues, an editorial notice headed, "Mr. A. R. Dunton;" and in the second of those issues an editorial notice headed, "Dunton's Writing-School," and also an advertisement headed, "Dunton's Writing-School?"

(Objected to as incompetent, the original being the proper evidence.)

A. I find them as described.

Q. 5. Is this bound volume of the file of the paper for 1858 a volume kept by you at the office of the paper which has succeeded the United States Democrat at Rockland?

A. It is.

Q. 6. Will you please produce a copy of the editorial notices and advertisement which you have pointed out, and state whether you have compared them with the originals herewith produced, and whether the same are correct copies?

(Objected to, copies being incompetent and inadmissible.)

A. I produce such copies, which I have compared, and they are correct copies.

(Copies offered in evidence by counsel for complainant, and marked,

respectively, "Complainant's exhibits Sprague Nos. 1, 2, and 3, E. G. T., S. E.")

Q. 7. Do the rules of your office permit you to allow the original
100 volume here produced to go out of your custody, and be filed as an exhibit in the clerk's office of the United States court in New York, where this suit is pending?

(Objected to as leading.)

A. They do not.

Q. 8. Have you any other copy of the newspapers from which the above extracts are copied than the copy you have produced here, from which said copy said extracts were made?

A. I presume not; I have no knowledge of any.

EDWIN SPRAGUE.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

D. J. STARRETT, a witness produced on the part of the complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. D. J. Starrett. I am forty-eight years of age. I reside at Thomaston, Maine. At present I have charge of the schools at Thomaston.

Q. 2. Do you hold any office in connection with the schools; and, if so, what?

A. I am on the school committee, and agent of that committee.

Q. 3. How long have you resided at Thomaston?

A. Since the year 1825.

Q. 4. Do you know Mr. A. R. Dunton, the writing-teacher, who has taught in this vicinity?

A. I do.

Q. 5. Has he taught in Thomaston at any time between the year 1854 and the year 1860, to your knowledge; and, if so, will you please state the date when he taught, and how you are able to fix that date?

101 A. I think he taught there in the year 1858, in the spring of the year; the precise time of the spring I could not say, but it was when the snow was breaking up and the frost coming out of the ground. I am inclined to think it was about the first of April or the last of March. The only way I could fix the date was a little circumstance that took place in the school, about his going to Rockland to finish his school there, and some of the pupils in Thomaston finding fault with him because he left his school in Thomaston in charge of his assistant, they thinking he should be there instead of him.

Q. 6. Did you attend the school at the time yourself?

A. I did. I think I took only twelve lessons at that time from him.

Q. 7. Who were his assistants at the time, if you remember?

A. I could not give the gentleman's name. His wife was one of his assistants, and had charge of the school at that time, viz, the evenings he left to go to Rockland.

Q. 8. Do you think you would remember the name of the gentleman assistant if it were repeated to you now?

(Objected to as incompetent.)

A. I should hardly think I could. I could not be sure of it.

Q. 9. Have you been employed in teaching yourself?

A. I have, sir.

Q. 10. How extensively?

A. I should say that I had taught, during my life, perhaps, some forty terms; it may have been more, but not a great many less.

Q. 11. Did Mr. A. R. Dunton teach a writing-school in Thomaston, since you have lived there, at any other time than the occasion to which you have already testified, between the dates 1854 and 1860, to your knowledge?

A. He did not.

Q. 12. What opportunities did you have for knowing it, if he had kept any other school?

A. From the fact that I have been, more or less, interested in
102 the common schools there. I have never been away from Thomaston for any great length of time longer than ten months, except in 1864–'5.

Q. 13. Did you see Mr. Dunton write and draw when he was teaching the school at Thomaston?

A. Yes, sir.

Q. 14. Do you recollect having at that time ever seen in his possession, or seen him use, a pencil having lead at one end and a rubber eraser inserted in the place of the lead at the opposite end?

A. I do not.

And being cross-examined by Mr. Thacher, says:

X Q. 15. Did you not attend the teachers' institute, in the then county of Lincoln, at one or more places, in the year 1856?

A. I attended a teachers' institute at Waldoboro', but at what time it was I could not say without reference to a catalogue of it which was printed at that time.

X Q. 16. Did you not attend the teachers' institute at Rockland in the year 1856?

A. I did not.

X Q. 17. Do you not know the fact that in 1856 A. R. Dunton and wife gave instruction in penmanship in various teachers' institutes in this State, including this vicinity?

A. I do not.

D. J. STARRETT.

Subscribed and sworn to this 4th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

It is stipulated between counsel that the copy, notice, and advertisement from the Rockland Gazette, certified by J. P. Cilley, notary public, may be offered in evidence, with the same effect as if the original was produced by a deponent herein, in the same manner that the original of the United States Democrat was produced at this hearing, and subject to all other objections.

103 Counsel for complainant offers in evidence the copy, notice, and advertisement referred to in the foregoing stipulation, marked "Complainant's exhibits Cilley Nos. 1 & 2, E. G. T., S. E."

Examination adjourned to Boston, Mass., June 6, 1873, at 3 p. m., at the office of Messrs. Lathrop & Bishop.

BOSTON, *June 6th*, 1873—3 p. m.

Present: Mr. Blake and Mr. Wetmore, of counsel for complainant, and Mr. Washburn and Mr. Thacher, of counsel for defendant.

EDWIN W. GAY, a witness produced on the part of the complainant,

having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. Edwin W. Gay. I am twenty-eight years of age. I reside at Newton, Mass. I am a stationer.

Q. 2. Where are you engaged in that business? In connection with what firm, if any, and how long have you been so engaged?

A. At 130 State street, Boston; in connection with the firm of Aaron R. Gay & Co. I am a partner in that firm. I have been so engaged, as clerk and partner, for nine years.

Q. 3. Do you know Mr. A. R. Dunton, a writing-master, of this city?

A. Yes, sir.

Q. 4. Do you remember having any dealings with Mr. Dunton in the way of selling him pencils at your store since November last?

A. I do.

Q. 5. Will you please state when they occurred, as nearly as you remember.

A. I think it was about—I am pretty poor at remembering times—but I should judge it was pretty near two months after the fire.

104 Q. 6. Did you sell Mr. Dunton any pencils on that occasion?

A. I did.

Q. What kind of pencils did he ask for, if any?

A. He asked for pencils with rubber-inserted head—old pencils—also pencils of a fine grain of lead, for transferring.

Q. 8. What kind of pencils did you show him?

A. I showed him, among others, Herrick & Blunt's pencils, with the stamp of Rhoades & Sons.

Q. 9. What kind of pencils did he purchase?

A. I don't remember, distinctly, what pencils he purchased, but am very confident that he purchased one or more of the Herrick & Blunt's pencils and Faber's pencils.

Q. Please look at the pencil now shown you, defendant's exhibit E, and state how that compares with the Herrick & Blunt pencil you have mentioned.

A. They are similar, except the rubber in the end of this exhibit. The Herrick & Blunt had none.

Q. 11. Did Mr. Dunton make any statement in regard to the fire with respect to his motives for buying old pencils?

(Objected to as leading.)

A. Yes; he did.

Q. 12. What did he say?

A. He intimated——

(Objected to by counsel, on the ground that the witness cannot state intimations or conclusions, but only what was said.)

that he had lost the collection of old pencils and such things by the fire; that he was trying to make a new collection.

Q. 13. Do you know whether or not the Herrick & Blunt pencil are pencils now to be found in the market, and how long is it since they went out of the market?

A. I think they are not to be found in the market, but do not

105 know positively; have never searched for them. I know that at the time of my connection with my firm they were considered old stock—dead stock.

Q. 14. Had they ever been replenished in your stock since your connection with the firm?

A. Not to my knowledge.

Q. 15. Were you or not in the habit of showing them to your customers?

A. We were not.

Q. 16. What was the occasion of your showing them to Mr. Dunton?

A. One reason was because I had showed him everything else, and another was that I think he inquired for those pencils. He inquired for old stock; I know he inquired for old stock.

And being cross-examined by Mr. Washburn, says:

X Q. 17. How long have you been acquainted with Mr. A. R. Dunton?

A. That was my first acquaintance with him—when I sold him these pencils.

X Q. 18. Did you at the time know who he was?

A. I did.

X Q. 19. How did you know?

A. My partner said it was he.

X Q. 20. When did he say so?

A. He said Mr. Dunton had been in there at a previous time, and that was the time that he said so.

X Q. 21. Did he say so while Mr. Dunton was there or after he left?

A. I think after he left.

X Q. 22. How long after?

A. Immediately after.

X Q. 23. Is that all your knowledge that he was Mr. A. R. Dunton?

A. That was all at that time. I have had a man of his description be told to me to be Mr. Dunton by others since.

X Q. 24. By whom?

A. By Mr. Wetmore, present, and Mr. Lincoln, who is also present.

X Q. 25. What did they tell you?

106 A. They told me he was a man of dark complexion and black hair, and that I made the remark that his whiskers had been dyed, to which they assented.

X Q. 26. Did you ever see the man whom you supposed to be said A. R. Dunton on any other occasion except when you sold him the pencils?

A. I have.

X Q. 27. When and where, and how many times?

A. Twice at least—once in my store and once on the street; in the store since the transaction referred to above, and on the street within two weeks.

X Q. 28. On what street, and where, within two weeks?

A. I don't recollect what street. He was talking with another man. It was in Boston. I did not speak to him; I passed directly by.

X Q. 29. Is all your knowledge that this person was A. R. Dunton derived from what your partner told you and from the description of his personal characteristics given to you by Mr. Wetmore and Mr. Lincoln, as you have testified?

A. No, sir.

X Q. 30. What other knowledge have you?

A. Knowing that Mr. Dunton was a professional penman, and that he stated to me that he wished fine pencils for making transfers of his copies for engravers, I judged that he was Mr. Dunton.

X Q. 31. Have you now stated all your knowledge?

A. I am confident that conversation passed between us to this effect: that I had at one time used the copy-books of Payson, Dunton &

Scribner; and my recollection is that he said he was Mr. Dunton. This was at the time of the transaction I have referred to.

X Q. 32. Did he then state his Christian name?

A. I don't recollect that he did.

X Q. 33. Are you not aware that there are two Duntons—brothers—both writing-masters?

A. I am not.

(Defendant's counsel objects to the evidence of this witness as establishing, or tending to establish, the identity of A. R. Dunton with the person to whom he said he sold said pencils.)

107 X. Q. 34. Cannot you fix the time when you so sold said pencils more definitely?

A. I cannot.

X Q. 35. How do you fix it as being "pretty near two months after the fire?"

A. I guess at it.

X Q. 36. Have you "guessed" in case of the other statements you have made in this examination?

A. No, sir.

X Q. 37. Why did you guess at this?

A. To make an answer. To the best of my recollection that is about the time.

X Q. 38. When was the fire you refer to?

A. It was called the fire of November 9th and 10th, 1872.

X Q. 30. Will you swear that that transaction to which you have testified occurred prior to the 1st of February, 1873?

A. Not being able to give you the definite time, I won't swear to any time.

X Q. 40. Was Mr. Dunton alone at the time when he came in and bought the pencils, as you have testified?

A. He was alone.

X Q. 41. Did he ever come in more than once?

A. He did.

X Q. 42. When else?

A. Once before, and once after, at least.

X Q. 43. How long before, and how long after?

A. I don't know how long, but it was a short time between each visit.

X Q. 44. Was he alone on each occasion?

A. Not dealing with him personally on either the first or last time, I don't know personally; but my impression is that he was alone.

X Q. 45. Did he buy said pencils on any other occasion than the time you have mentioned?

A. I could not say.

X Q. 46. Will you swear positively that on the occasion to which you have testified, when you sold him those pencils, there was not another man present with him?

108 A. Of course our store is a retail store, and we have a great many customers in at all times. If there was anybody in company with him, I don't know it. To the best of my knowledge and belief, there was no one with him.

X Q. 47. Question repeated.

A. Having made that explanation, I can't swear.

X Q. 48. Please look at this man now present, and state if this man was not in company with said person, whom you understood to be A. R. Dunton, when he purchased those pencils, as you have testified?

(Counsel for complainant requests counsel for defendant to give the name and residence of the person produced.

Counsel for defendant states that the counsel for complainant, in cross-examination of Mr. Dunton, in like manner produced a man, and asked said Dunton if he remembered seeing him; if he did not show him, Dunton, a certain pencil; if he did not remember that he met him at Memphis, at race-time, in 1859, and had certain specified conversation with him, and all without disclosing the name of the person so produced. And farther states that the person now produced will be produced again at the proper time and place, as a rebutting witness, with full opportunity to complainant to cross-examine him.

For the convenience of the court, counsel for complainant calls attention to defendant's record, pp. 87 and 88, fols. 326 to 328, and points out that no request was made for the name and residence of the person mentioned in X Q. 176, and objects to the question as improper.)

A. I don't know that I ever saw the man before.

(Counsel for complainant asks the person exhibited his name and residence.

Defendant's counsel thereupon instructed the person not to answer.

109 The person exhibited declines to answer, as being instructed by counsel so to do.)

X Q. 49. Did you, at the time you have mentioned, have in your store any of said Herrick & Blunt's pencils, when you so sold the same to said Dunton?

A. I did.

X Q. 50. How many in all?

A. I don't know.

X Q. 51. State as near as you can?

A. Several dozen.

X Q. 52. How many of them did you sell to him?

A. I answer that question as I have answered it before. I refer to the answer to the question asked by Mr. Wetmore, when I said he bought one of Herrick & Blunt's and one of Faber's.

X Q. 53. Please look at the pencil now shown you, and state if that is the one you sold him, which you have referred to in your last answer as "one of the Herrick & Blunt's?"

A. I can't swear to the pencil, sir.

X Q. 54. Answer to the best of your knowledge and belief if that is the pencil?

A. It is a similar pencil.

(Counsel for defendant offers the pencil shown witness in evidence, marked "Defendant's exhibit K K, E. G. T., S. E."

The pencil marked "Defendant's exhibit K K" is produced by counsel for defendant.)

X Q. 55. What did you answer when he asked for pencils with rubber-inserted head?

A. I told him that we had none of the kind he referred to.

X Q. 56. What do you mean by "Faber pencil," one of which you said that you sold him on that occasion?

A. One of A. W. Faber's; I mean one stamped "A. W. Faber;" I don't mean to say that I did sell him one of Faber's pencils.

X Q. 57. Were the stamps and letters upon the "Rhoades &
110 Sons' pencil," one of which you state you are confident you sold the said Dunton on said occasion, the same as the stamps and letters on the pencil, defendant's exhibit K K, now shown you again?

A. I don't know whether it is the same or not.

X Q. 58. Answer to the best of your knowledge and belief, whether they are the same to your recollection.

A. We had pencils stamped Rhoades & Sons, but whether they were stamped with the same die or not I do not know; further, the pencil referred to as being sold was stamped Rhoades & Sons, and was just about the same size and color of wood as this exhibit.

X Q. 59. When was your attention first called to this transaction after its occurrence, and by whom?

A. I don't recollect when it was first called, but do know that it was called to it by there being after enquiries for the same pencil.

X Q. 60. Who made those enquiries of you?

A. I don't know who made them.

X Q. 61. Were they made by a man? and, if so, describe him.

A. Made by a man; I can't describe him.

X Q. 62. Can you give any idea of him, whether he was young or old, tall or short, or how he was dressed?

A. I did not wait upon the customer, and took no special note of his face, color, or complexion.

X Q. 63. Was he a customer, and what did he buy?

A. He bought pencils, and therefore was a customer.

X Q. 64. What kind of pencils did he buy of you?

A. He bought Herrick & Blunt's pencils, such as were so called.

X Q. 65. Were they just like the one you sold Dunton, as you have stated, and like defendant's exhibit K K?

A. I couldn't say.

X Q. 66. To the best of your knowledge and recollection, were they?

A. To the best of my knowledge and recollection they were, being part of the same lot.

X Q. 67. How long was it after you sold said Herrick pencil
111 to said Dunton that you made this sale of the same pencil to this person whom you don't know and can't describe?

A. I don't know.

X Q. 68. State as near as you can?

A. I should guess it was within a month afterwards.

X Q. 69. How many of those pencils did you sell to that person?

A. I don't know how many, not waiting upon the man personally. Probably my clerk could tell.

X Q. 70. Don't you know that all you had remaining were sold to that person?

A. I don't know. It is my impression that he took all that we could find.

X Q. 71. Have you never heard that man's name mentioned?

A. I don't remember having heard it.

X Q. 72. Did you ever see him at any other time?

A. Not that I know of.

X Q. 73. Did you ever make any other sales of that kind of pencil, except the one to said Dunton and the rest of them, to that other person?

A. I don't know.

X Q. 74. Do you remember of making any other sales?

A. I can remember no particular case.

X Q. 75. Did you ever have any inquiries for them, except by these two persons?

A. That is more than I can answer.

X Q. 76. Have you any recollection of having had inquiries from any one else?

A. I have no recollection.

X Q. 77. Did that person to whom you sold the rest of said pencils say anything to you in relation to this, or a suit pending?

A. I stated before that I did not deal personally with the person, and therefore do not know whether he said anything or not.

X Q. 78. What is the name of the person who did so deal with him?

A. I believe it is my clerk, named Henry J. Learned.

112 X Q. 79. When, first, after said sale to Dunton, was your attention called personally thereto, or to said Herrick pencil, and by whom?

A. My impression is, at the time of said sale to said other party, my attention was called to it as of moment by no one; only the circumstances of the sale.

X Q. 80. When next, and by whom?

A. By Mr. Lincoln, now present. I don't know when. I should say within three months from the present time.

X Q. 81. How long after said sale to said other person?

A. Quite soon after.

X Q. 82. Within three days after?

A. I can't answer that question. I don't know whether it was three days or a week.

X Q. 83. What did Mr. Lincoln say to you?

A. Mr. Lincoln's conversation was about pencils, and also about pencils with rubber in the top.

X Q. 84. I did not ask what his conversation was about. Please say what he said to you?

A. I did not make any note of it, and therefore I don't know.

X Q. 85. Can't you remember the substance of anything he said to you?

A. I remember the conversation was about pencils, and Herrick & Blunt's pencils in particular.

X Q. 86. What about them?

A. I think he asked me if there had been anybody there to buy them lately. That is all that I can recollect.

X Q. 87. Did he not mention the fact that a suit was pending connected with them?

A. I think he did.

X Q. 88. What did he say about it?

A. I can't give the information, but the impression came from conversation at that time, or some other time, about the suit.

X Q. 89. How many times did Mr. Lincoln see you?

A. Twice, I think.

X Q. 90. When was the second time?

A. After the other; I can't say when it was; I should say the whole thing was within three months at the present time.

113 X Q. 91. Can't you tell whether the second time was nearer one day or one month after the first time?

A. About as near one as the other, as far as I can recollect.

X Q. 92. About how long ago, as nearly as you can state, was the second time?

A. My impression is now that he made three visits, one within a day or two of the present time and the other as I said before.

X Q. 93. What did he say to you the last time about this matter?

A. He asked me if I would be willing to state the facts, such as I knew, and make an affidavit, if necessary. He said he did not wish to trespass upon my time; said it would not take more than half an hour, whereupon I consented.

X Q. 94. And is that why you came here to-day as a witness?

A. That is why I came to-day.

X Q. 95. Did any one else ever have any conversation with you about that matter and about those pencils? and, if so, state whom.

A. I don't recollect of anybody else, except the clerks in the store.

And being further examined on the redirect, says:

Re-D. Q. 96. Do you recognize the person now present, and seated opposite to you, who came into this room after your cross-examination had been proceeding for some time, and has been present, with the exception of a very brief interval, ever since? and if you do so recognize him, please state who he is?

A. I recognize him as the person to whom I sold the pencils referred to, and called Mr. Dunton.

Counsel for complainant requests the counsel for defendant to admit that the person present, and referred to in the last question and answer, is Alvin R. Dunton, who has already testified in this case.

Counsel for defendant does so admit.

EDWIN W. GAY.

114 The examination of the witness Gay is suspended, by consent of counsel, till June 7th, 1873.

BOSTON, *June* 7, 1873.

Present, counsel as before.

And the witness, EDWIN W. GAY, being further examined on the redirect, says:

Re-D. Q. 97. What is your best recollection as to the number of Herrick & Blunt pencils sold to Mr. Dunton on the occasion you have mentioned in your direct examination?

(Objected to, on the ground that prior to the adjournment last night the witness had stated the number, both on his direct and cross-examination.)

A. To the best of my recollection, there was one, at least, and possibly more pencils. Mr. Dunton buying, in all, of different kinds of pencils, I should think, nearly a dozen.

Re-D. Q. 98. Please look at the bunch of pencils produced, and state what kind of pencils they are?

A. They are Herrick & Blunt's pencils, marked H. B.

Re-D. Q. 99. What was the customary manner in which the grades of those pencils were indicated?

A. The pencils of hard grade were marked with H, or several H's, according to the degree of hardness. Other degrees of hardness were marked H B—B, and so on, indicating softer leads.

Re-D. Q. 100. Are these the kind of Herrick & Blunt pencils referred to in your previous examination?

A. Those are the kind of pencils referred to.

(Counsel for complainant offers in evidence the bunch of pencils, consisting of eight, referred to, marked "Complainant's exhibit Gay No. 1, E. G. T., S. E.")

And being further cross-examined by Mr. Washburn says:

Re-X Q. 101. What do you mean, in your last answer, by saying they are the "kind" of pencils referred to?

115 A. I mean that they are Herrick & Blunt pencils, and we had pencils with just such wrappers as cover that bunch; there were a dozen in a bunch, the package shown being a broken bunch.

Re-X Q. 102. Were the stamps and letters upon those pencils you have testified to and these all precisely the same?

A. I cannot definitely answer that question; it is very probable that we had Herrick & Blunt pencils of different stamps, showing the different grades, in order to make an assortment.

Re-X Q. 103. Did not some of those you have testified to have, in addition to the words Rhoades & Sons, London, J. K. Herrick & Co., instead of Herrick & Blunt, upon them?

A. To the best of my recollection, we had them with both stamps; that is, with Herrick & Blunt and J. K. Herrick & Co., being, probably, from lots bought at different times.

Re-X Q. 104. Are not these pencils now produced, complainant's exhibit Gay No. 1, the same, or part of the same, that you subsequently sold, as you have testified, to that other person whom you say you don't know and can't describe?

A. To the best of my knowledge, they are a part of the same.

EDWIN W. GAY.

Subscribed and sworn to the 7th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

Examination of witnesses adjourned to new notice.

BOSTON, *June 6th*, 1873—8 p. m.

Present, counsel for both parties, as before.

Mrs. LURA C. THOMAS, a witness produced on the part of the
116 complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name and business?

A. Lura C. Thomas; I do dress-making.

Q. 2. Are you the wife of Silas C. Thomas?

A. Yes, sir.

Q. 3. Where do you reside?

A. At East Boston.

Q. 4. Do you know Alvin R. Dunton; and, if yea, when and where did you first know him?

A. Yes, sir; I knew him first in Camden, Maine, in 1856.

Q. 5. Did you reside in Camden, Maine, at that time?

A. Yes, sir.

Q. 6. Did your husband ever go to teach with Mr. Dunton; and, if so, when?

A. Yes, sir; in 1857.

Q. Did A. R. Dunton visit you in April last; and, if so, when?

A. Yes, sir; about the middle of April.

Q. 8. If you had any conversation with him at that time, state what it was.

A. I did not say much to him, but he said considerable. He said that he believed that my husband would kill him; that he had gone in on the other side and was telling what he knew about it. That was about all he said.

Q. 9. Did he say anything about your husband's movements; and, if so, what did he say?

(Objected to as leading, and because the witness has already professed to state all that he has said.)

A. He said that he was going on the other side, and was going to knock all the thing on the head. He seemed to be very worried about it.

Q. 20. Did he propose any business for your husband; and, if so, what did he say?

(Same objection.)

A. He said he would like to get him out of town, and to know if he would go away if he would provide him with books. I told him I did not think he would.

117 Q. 11. Did your husband ever show you a certificate signed by Mr. Dunton?

(Objected to unless produced.)

A. Yes, sir; he did.

Q. 12. Where is that certificate now?

(Same objection.)

A. I don't know.

Q. 13. In whose hands did you last see it?

(Same objection.)

A. In my husband's.

Q. 14. When did you last see it?

(Same objection.)

A. About the middle of March.

Q. 15. What did that certificate say in substance?

(Objected to as an attempt to get into the case the contents of a paper-writing without laying the foundation for secondary proof, and without producing it, or accounting for its non-production, and a paper which is inadmissible in itself.)

A. It was to certify that my husband was qualified to teach the Duntonian system of writing.

Q. 16. In what year was this dated?

(Same objection.)

A. 1857.

Q. 17. You have stated that you are a dress-maker. Do you support yourself and family?

(Objected to as immaterial and irrelevant.)

A. Yes, sir; I depend upon myself.

Q. 18. Who asked you to come here and testify to-night?

A. That gentleman there—Mr. Blake.

118 And being cross-examined by Mr. Washburn, says:

X Q. 19. You have stated that you first knew Alvin R. Dunton in Camden, Maine, in 1856. What time in 1856?

A. It was in the fall; it was at Thanksgiving time. It must have been when Thanksgiving was.

X Q. 20. Please state when you were married to Silas C. Thomas.

A. In 1853.

X Q. 21. Are you on good terms with Alvin R. Dunton at the present time?

A. Well, I don't know what you mean.

X Q. 22. Have you recently written him a letter?

A. Yes, sir.

X Q. 23. Why did you write it?

A. Because I had heard that he had been saying things that he had no reason to say.

X Q. 24. What things?

A. Something in regard to my husband getting money.

X Q. 25. Please state more particularly the facts.

A. He said something about my husband getting money. He said that my husband got money gambling, or something of that sort; said that I told him; and I did not tell him, and I wrote him contradicting it.

X Q. 26. When did you so write him?

A. About the middle of April of this year.

X Q. 27. Have you not, on that account, recently expressed yourself angrily against Mr. Dunton?

A. Well, I don't know that I have. I might have said that I did not think much of him, or something of that sort.

X Q. 28. Did you not, in that letter, express yourself angrily toward him on that account?

A. I don't know that I did.

X Q. 29. Have you pleasant feelings toward him at the present time?

A. No, I don't think I have.

X Q. 30. Was it true, what you say Mr. Dunton said, that your husband had gone in on the other side; and what do you mean by the other side?

119 A. I don't know whether my husband has gone in on the other side or not. I mean that Mr. Dunton wanted to make it out that he got up the pencil before Mr. Illfelder did, and that he was in evidence on that side for Mr. Dunton, and that he had changed his mind, and was going to give testimony on the other side—for Illfelder.

X Q. 31. Do you mean the Mr. Illfelder who is now present?

A. Yes, sir.

X Q. 32. When did you first see Mr. Illfelder?

A. I think it was about the last of April, this year.

X Q. 33. Where?

A. At our house, in East Boston.

X Q. 34. How many times has he been at your house in East Boston since then?

A. Once.

X Q. 35. Is that the only other time you have seen him at all?

A. Twice he has been at our house.

X Q. 36. Have you seen him at any other time?

A. No, sir.

X Q. 37. Was not your husband recently in Maine, in company with Mr. Illfelder?

A. Not that I know of.

X Q. 38. Were you ever so informed by anybody?

A. No, sir.

X Q. 39. Has your husband been at home all the time during the months of April and May last?

A. No, sir.

X Q. 40. How much of the time has he been absent. and when?

A. He has been gone a number of different times; I don't know how long or just when it was.

X Q. 41. Do you know where he has been when absent?

A. No, sir; not all the time.

X Q. 42. Do you not know that he has been in Maine during some time during that period?

A. He was in Camden, I think.

120 X Q. 43. When and how long was he in Camden, Maine?

A. I don't know.

X Q. 44. State as near as you can?

A. He was away for about a week, but I don't know where he was.

X Q. 45. When was that, as nearly as you can state?
A. About the middle of April, I should think.
X Q. 46. Was it before or after that journey that Mr. Dunton said what you have stated at your house?
A. Before.
X Q. 47. Had Illfelder been at your house before that time, when Mr. Dunton said what you have stated?
A. No, sir.
X Q. 48. How long after that was it that Mr. Illfelder first came?
A. I don't remember.
X Q. 49. When did you see your husband last?
A. He came over here to Boston with me; about five o'clock to-day.
X Q. 50. Where was he then?
A. On Washington street.
X Q. 51. Did he not come to this hotel where we are taking this testimony with you?
A. No, sir.
X Q. 52. Do you expect him to return with you when you leave here?
A. I have not thought much about it.
X Q. 53. Did the said letter which you wrote Mr. Dunton express your real feeling toward him?
A. It did.

LURA C. THOMAS.

The further cross-examination is suspended, by consent of counsel, till June 7th, 1873.

BOSTON, *June* 7, 1873.

Present, counsel as before.

And the cross-examination of Mrs. LURA C. THOMAS being continued by Mr. Washburn, she says as follows:

121 X Q. 54. Please look at the letter with the envelope now shown you, and state if it is the letter which you sent to Mr. A. R. Dunton, as you have testified.
(Objected to as immaterial.)
A. I think that is the one.
X Q. 55. Do you not know it is the one?
A. It is the one, or one just like it—very near like it; there might be some little change in it, perhaps.
X Q. 56. Is that your signature to it?
A. Yes, sir.
X Q. 57. Is that the signature of Annie Thomas, who appears as witness, on it?
A. Yes, sir.
X Q. 58. Who is Annie Thomas?
A. My daughter.
(Letter marked "L L" for identification.)

Counsel for complainant requests the counsel for defendant to produce the letter referred to by the last witness, and annex it to her deposition.

Counsel for defendant states that the same has been marked for identification, and that when defendant's time for offering rebutting testimony comes, he shall, if so advised, and deemed necessary, produce the same.

LURA C. THOMAS.

Subscribed and sworn to this 7th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

BOSTON, *June 6th*, 1873—9 p. m.

JOSEPH P. WATERHOUSE, a witness produced on the part of the complainant, having been first duly sworn, in answer to the interrogatories propounded by counsel for complainant, says:

122 Q. 1. What is your name, age, residence, and occupation?

A. Joseph P. Waterhouse; I am 49 years of age; I reside in Boston, Mass.; I am a book-keeper.

Q. 2. Have you ever had any experience as a teacher? And if yea, please state during what period, and what you taught.

A. I have. My experience as a teacher has extended over quite a number of years—from the time I was 17 years of age. I have taught, more or less, till within the last six years. I taught in public schools the early part of my life; and since, in the more recent portion of my life, I taught penmanship, extending over a space, I might say, of about 25 years.

Q. 3. Do you know Mr. Alvin R. Dunton, a writing-master, now or formerly residing in this city?

A. I do.

Q. 4. How long have you known him?

A. I first became acquainted with him, I think, in 1848 or 1849.

Q. 5. Did you ever have any business connection with him; and, if so, what was that connection, and when did it occur?

A. I have; I taught penmanship for him in 1853, for about, I think, between two and three months, I think it was.

Q. 6. During the time of such connection, or at any other time, have you seen Mr. Dunton write and draw; and, if yea, how extensive have been your observations of his writing and drawing?

A. I have seen him write and draw during the time I was engaged with him, and my opportunities for observation, I think, were good.

Q. 7. What attention did you pay, during the period over which your observation of Mr. Dunton's writing and drawing extended, to those arts and the implements employed therein?

A. As I was connected with him in teaching, being interested in both writing and drawing, I naturally was very attentive as to what
123 he might write or draw, and also would naturally notice the implements that he used.

(Answer objected to as argumentative and inferential.)

Q. 8. During the period referred to did you ever see Mr. Dunton use, or have in his possession, a pencil-eraser, consisting of a wooden pencil with lead at one end, in the ordinary manner, and rubber inserted in the place of the lead at the other end?

A. I have no recollection of seeing him use such an instrument.

Q. 9. Had he used such an implement, what do you say as to whether or not it would have attracted your attention?

(Objected to as an attempt to lead the witness and as calling for a mere supposition and opinion of the witness.)

A. I think I should have been likely to have noticed it.

Q. 10. Have you had any interview with the said A. R. Dunton within the past six months relative to his alleged use of such pencil-eraser? And if yea, please state what took place at that interview, and when the same occurred.

A. I had an interview with him, I think, last February. I went up to

his room, at No. 14 Tremont street. upon his invitation. He showed me a number of pencils which he took from a drawer, stating that those were pencils which he had made, from time to time, one of which number he selected as having been made by him previous to 1857. He said, farther, that the pencils which he had and exhibited were not old enough, or had not been made far enough back, to do him any good in this case; that he was about going down to Camden, Maine, to see if he had not left a pencil of the description which he wanted previously to 1856. I think was what he stated. I don't think of anything else that was relative.

124 Q. 11. Did he say anything to you at that interview relative to your recollection of his alleged use of said pencil-eraser; and, if yea, what, and what did you reply?

(Objected to as leading, and because the witness has professed to state already all that has occurred.)

A. He asked me if I could not remember his having used them in his school when I was with him in 1853. My answer was that I could not.

Q. 12. Did he make any response; and, if yea, what was the nature of that response?

A. He did; and to the best of my recollection he said it was devilish strange I could not remember it.

Q. 13. What did you say to that?

A. I am not sure that I made any reply.

Q. 14. Did he say anything further; and, if so, what?

A. I think he didn't say anything further at that interview. If he did, I do not remember what it was.

Q. 15. What was his manner when he said it was devilish strange you could not remember?

(Objected to as immaterial and trivial.)

A. Sneering and indignant.

Q. 16. Did you have any subsequent interview with him relative to the same subject?

A. I did.

Q 17. How long after?

A. A few days; perhaps a week. It might have been more.

Q. 18. Where was it?

A. At the same number; a back-room.

Q. 19. What did he say?

A. He asked me over again if I could not remember of his having used the pencil when I was with him.

Q. 20. What did you say?

A. I said I could not.

Q. 21. What did he then say, if anything?

125 A. That he thought it was damned strange I could not remember, and that he would not begrudge fifty dollars if I could.

Q. 22. At either of these interviews did he exhibit any particular pencil to you, and make any statement to you concerning the same, in regard to the time when it was made, as compared with pencils of the same kind, subsequently made by him; and, if yea, what was that statement, to the best of your recollection?

A. He showed me a pencil which, to the best of my recollection now, he said was made in 1856; and I have an impression that he described the way in which he came to make it, by having noticed lying upon the floor two separate halves of a pencil, saying that the circumstance first gave him an idea of taking out a portion of the lead from one end and inserting rubber, which he done in that instance.

And being cross-examined by Mr. Washburn, says:

X Q. 23. When did you commence teaching writing?

A. In the fall of 1847.

X Q. 24. What time in 1853 was it that you assisted Mr. Dunton, as you have stated?

A. In the fall of the year.

X Q. 25. Why did you leave him?

A. I left him for the reason that the remuneration I was getting I did not consider equivalent for the service.

X Q. 26. What were your duties while in his employment?

A. Teaching penmanship.

X Q. 27. Did you have separate pupils, and were you able to teach them wholly yourself, or did you have to depend upon Mr. Dunton for assistance?

A. I had separate pupils in no other way than this: there were a few of the teachers who took lessons in penmanship, that Mr. Dunton, when present, preferred setting the copies rather than have me.

X Q. 28. Otherwise than this, then, you wholly taught the pupils that you had charge of?

A. The question is not a fair one to give a direct answer.

X Q. 29. I mean did you attend separately to the instruction of those pupils for whom you yourself set the copies?

126 A. I will say, in answer to that, there was no particular assignment of any particular class or number of the school for me to instruct.

X Q. 30. What did you next do when you left Mr. Dunton's employment?

A. Whether I taught school that winter, after returning to Maine, or attended to the duties pertaining to the care of a farm, I don't recollect now.

X Q. 31. Will you please describe the pencils which you have stated Mr. Dunton showed you, and asked you if you remembered?

A. In answer to the first part of the question, by way of description of the pencils he showed me, I can only say, as I took a general observation of them, that they were all generally sharpened at one end, some at both, the ends of the same being considerably dark, and some ink or other dark substance, more or less, on the sides of the pencil. I think there was rubber in one end and lead in the other.

X Q. 32. Are you now able to definitely recollect and state all the implements had or used by Mr. Dunton, when you were employed by him, in writing and drawing?

A. I think I am. For writing he used a steel pen and sometimes a gold pen. His drawing was executed with a gold or steel pen, except for card-marking he used a style, the point of which was a composition, as I have been told.

X Q. 33. Have you now stated all the implements which Mr. Dunton then so had and used, as you recollect?

A. I think he used a rule and dividers. It is my impression, at least, that he had them at his room.

X Q. 34. Same question repeated.

A. I recollect of nothing else now.

X Q. 35. While you were so with him, did he get up and execute any large writing-charts?

A. I don't recollect of his getting any up at that time.

X Q. 36. Did he get up and execute, at that time, any copy writing-books, for publication, that you remember?

A. I don't think he worked in getting up any writing-books at the time I was with him.

127 And being further examined on the redirect, says:

Re-d. Q. 37. While you were with Mr. Dunton, he used the ordinary lead-pencil then in the market, of various degrees of hardness, did he not?

A. I think so.

Re-d. Q. 38. Has Mr. Dunton given you any employment lately, and if so, what was it?

(Objected to as new matter.)

A. Through Mr. Dunton I have had some copying to do, and was paid for it by another party. I should say this was in the neighborhood of two months or six weeks ago.

J. P. WATERHOUSE.

Subscribed and sworn to this 6th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

BOSTON, *June* 25, 1873—10.30 a. m.

Met pursuant to notice.

Present: C. F. Blake, of counsel for complainant, and Mr. Washburn and Mr. Thacher, of counsel for defendant.

JAMES A. MATTHEWS, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant says:

Q. 1. What is your name, age, residence, and occupation?

A. James A. Matthews; I am thirty-three years of age; I reside now at South Boston; I am conductor of a street car.

Q. 2. Do you know A. R. Dutton, and, if yea, how long have you known him?

A. I do; I have known him ever since I was a small boy—old enough to know any one.

128 Q. 3. Did you ever take lessons of him, and, if yea, when and where?

A. I have; at Lincolnville Center, Waldo County, Maine, in the fall of 1857.

Q. 4. Where did Mr. Dunton board at that time?

A. Part of the time at my father's, and a part of the time at a hotel, near by; and a part of the time with his own folks, I presume, at Hope Corner.

Q. 5. During the time that Mr. Dunton boarded with your father, did he, in writing or drawing, use a pencil having rubber in one end of it?

A. Never to my knowledge.

Q. 6. While he was at your father's, did you see him writing and drawing, and how often?

A. I did. I could not tell exactly, but occasionally, whenever he got a chance. His wife was there, and they were showing their styles—his wife, Mr. Thomas, and himself.

And being cross-examined, says:

X Q. 7. What, if any, relation to you, is Wm. R. Matthews, now keeping a boarding-house at Belfast, Maine?

A. My father.

X Q. 8. How long was Mr. Dunton boarding at your father's in the fall of 1857, at Lincolnville Center, Maine, as you have testified?

A. I could not state exactly; he was off and on, during two or three weeks' time.

X Q. 9. How long were you taking lessons of him?

A. I think about three weeks; twelve lessons in all. He had two schools at the same time, one at Hope Corner, and the other at Lincolnville Center, and gave lessons on alternate evenings at each.

X Q. 10. State whether you did not previously see Mr. and Mrs. Dunton in Lincolnville, and, if so, when?

A. Never remember seeing them there together, till the time of the writing-school.

X Q. 11. Did you ever see them, or either of them, there, or at any other place in Maine previous to that time?

A. Seen him frequently—always.

129 X Q. 12. When last, before that time?

A. I cannot fix the time.

X Q. 13. State as nearly as you can how long before.

A. I should think every year or two, up to the fall of 1857—from the time I was old enough to know.

X Q. 14. How old were you then, at the time you took lessons of him?

A. Seventeen, that December.

X Q. 15. Do you remember the occurrence of his marriage to said Mrs Dunton, or hearing of it?

A. I do not; not until he came there to teach the school.

X Q. 16. At the various times, or any of them, when you say you saw. said Dunton in Maine, every year or two prior to your taking lessons of him, in the fall of 1857, was he engaged in teaching writing there?

A. Not to my knowledge.

X Q. 17. Did you have any occasion to know whether he was or not, and, if so, what?

A. Always knowing of A. R. Dunton and his writing and writing-books, I think I should have known it if he had been teaching in the vicinity of Hope, Camden, or Lincolnville.

X Q. 18. Did you ever before take writing-lessons of any one?

A. Yes, sir.

X Q. 19. When last before that, and of whom?

A. At the high schools which I attended at Lincolnville, in the falls of 1855 and 1856; and also to a Miss Fairbanks, who was a writing school teacher, and gave lessons evenings, at what's called the Heal School House.

J. A. MATTHEWS.

Subscribed and sworn to this 25th day of June, 1873.

E. G. THOMPSON,
Special Examiner.

130 WILLIAM N. BARTHOLOMEW, a witness produced on the part of complainant, having been first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. William N. Bartholomew; I am 51 years of age; I reside at the village of Newton Center; I have no special occupation at present.

Q. 2. Did you ever teach drawing, and, if yea, where and when?

A. I have taught drawing in the public schools in Boston. I cannot give the exact numbers, but in round numbers for twenty years, ending in 1871.

Q. 3. Will you please look at defendant's Exhibit E, and state what its value is, practically, as an eraser for drawing purposes?

(Objected to as immaterial and irrelevant, and as tending to dispute the utility of the alleged invention of complainant's assignor, and also on the ground that a sufficient foundation has not been laid.)

A. For the purposes of an eraser it would be valueless to me.

And, being cross-examined, says:

X Q. 4. Did you ever use a pencil-eraser like said Exhibit E?

A. I never did exactly like that.

X Q. 5. Your answer that it would be valueless to you, is then a matter of opinion, is it not?

A. I have no practical knowledge of that pencil; it is a matter of opinion.

WM. N. BARTHOLOMEW.

Subscribed and sworn to this 25th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

131 WM. N. BARTHOLOMEW, being recalled, in answer to further interrogatories on the part of the complainant, says:

Red. Q. 6. State, if you please, why you think this pencil, (defendant's Exhibit E,) would be valueless as an eraser.

(Same objection as before, and because the witness has stated that he has never used a pencil like it, and it is only matter of his opinion that it is valueless.)

A. I think it valueless for the reason that in the nature of things it seems to me impossible to erase a line with it; I think the result would be that it would smut the drawing—meaning by that, that the lead would be rubbed into the paper instead of off. The reason why I think so, is the want of firmness in the rubber.

WM. N. BARTHOLOMEW.

Subscribed and sworn to this 25th day of June, A. D. 1873.

E. G. THOMPSON, *Examiner.*

CHARLES H. HOOPER, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. Charles H. Hooper. I am thirty-seven years of age. I reside in Boston. I am a stationer.

Q. 2. What is the name of your firm, and where do you carry on your business?

A. Hooper, Lewis & Co.; at 120 and 122 State street, Boston.

Q. 3. Do you know A. R. Dunton?

A. I do.

Q. 4. Did A. R. Dunton come to your place of buiness since the fire, and if so, when, and if he did, state what he said to you on that occasion in regard to pencils?

132 A. He did. The first time that he came was a few months since. I should say about four or five months ago. He wished to know if we had any pencils like the one he had in his possession, which I made out from the mark to have been manufactured for Herrick & Blunt. I told him that we had not. He then wished to know if I could give him the date when the concern of Herrick & Blunt was in operation. I told him I could not, but would enquire of my brother, John S. Hooper, which I did. He could not give me any precise date, but judged

the concern had not been in operation for at least twenty or twenty-five years, which information I gave to Mr. Dunton. Then Mr. Dunton asked me where I thought any such pencils could be obtained. I told him it was a matter of chance; that most any stationer who had been in the business for some time might have some stowed away in his old stock. He stated that he had been in most of the stationers on his way down; and I then recommended him to Messrs. Aaron R. Gay & Co., 130 State street, as being a place where he would possibly find them. This is all with regard to the first visit I had from him. He has been in twice since then, quite recently, within a few weeks, I believe, and stated that he was much obliged to me for recommending him to Messrs. A. R. Gay & Co., as he had found some of the pencils there, and purchased one.

Q. 5. How far is Gay & Co.'s place from your place of business, and is it above or below you on State street?

A. It is four doors below us.

Q. 6. When Mr. Dunton came to you for the first time, was he alone or was any one with him?

A. He was alone, but some one joined him before he left me.

And, being cross-examined by Mr. Washburn, says:

X Q. 7. Your house is the oldest stationery house in the city of Boston, is it not?

A. It is, to the best of my knowledge.

X Q. 8. When was it founded?

A. 1798.

133 X Q. 9. Did you show the pencil which Dunton had in his possession to your brother when you inquired of your brother in relation to it, as you have stated?

A. I think I did not.

X Q. 10. Did you take said pencil into your own hands and examine it?

A. I did.

X Q. 11. Where was your brother at the time?

A. He was up stairs.

X Q. 12. Did you take the pencil with you when you went up to enquire of your brother?

A. I think I did not.

X Q. 13. Please describe the said pencil which said Dunton then had and which you examined, and any peculiarities of it.

A. It was a pencil made of the plain cedar, looking as though it had been in use for many years, with a small piece of rubber protruding from one end, and the lead from the other; I should say the pencil was about two-thirds the usual length; it had enough of the mark on it for me to know that it was manufactured for Herrick & Blunt.

X Q. 14. Please look at defendant's Exhibit E, now shown you, and state if that is the pencil which said Dunton then had in his possession and showed you, and which you then took in your hands and examined as you have testified.

A. I should say that that was the identical pencil, the same portion of the name of Herrick being gone, as on the pencil he showed me.

CHAS. H. HOOPER.

Subscribed and sworn to this 25th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

SAMUEL S. GAY, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

134 A. Samuel S. Gay; I am 54 years of age; I reside at Boston Highlands; I am a stationer.

Q. 2. Do you know A. R. Dunton, and, if so, how long have you known him?

A. I do; I have known him probably for twenty-five years, or since he came to Boston for business, which, I think, was twenty-five years or longer.

Q. 3. Did he purchase of you some pencils at or about the time of the fire?

(Objected to as leading and clearly intended to get the witness to testify to a date which is indicated to him, when the time at which the transaction did occur is the only matter of importance about it.)

A. Yes; I could not say positive; somewhere it might have been from one to two months after the fire.

Q. 4. Please state what Mr. Dunton said to you when he made this purchase.

A. Probably he was in three times; the first time he came in he asked for specimens of steel pens; then that led to questions of pencils; I showed him the different grades that there were in the market, and one in particular I showed him was one that I thought I could recommend—a reporter's pencil; he took that pencil for one, and he took some samples of hexagon pencils, which I can't say were Fabers or Eagles; then he referred to whether we had some old lots of pencils; I told him we had; we had the Rhoades & Son's pencil, also the Mears pencil, and, as far as my knowledge, he bought the Rhoades & Son's pencils—Herrick & Blunt; then he referred to the different rubbers there were in the market; I showed him our assortment of rubbers which we called Diamond and Union—vulcanized rubbers; and to show him what the quality was and how it consumed, I showed him a piece of rubber that I had carried in my pocket two years, which was $\frac{3}{4}$ of an inch wide by $1\frac{1}{2}$ inches long. Then he says, I want a piece of that rubber, which he took out his knife and cut through the middle, which left the remaining

135 piece about $\frac{3}{8}$ of an inch wide, and he had a piece about $\frac{3}{8}$ of an inch wide by $\frac{1}{4}$ thick. He gave no reasons for asking for a piece of that particular rubber.

Q. 5. Have you the box in which were the Rhoades pencils which you sold him; and, if so, will you please produce it, with its contents?

A. I have, and now produce it.

(Box and contents offered in evidence and marked "Complainant's Exhibit, S. S. Gay, No. 1, E. G. T., Ex'r.")

The box contained at that time, as far as I know, all the Herrick & Blunt, Rhoades & Son's pencils, and the Mears pencils which I showed him, and Lehman's hexagon pencils.

Q. 6. I observe on the end of the box the words "odds and ends." Were these words on the box at the time that you made the sale you have mentioned to Mr. Dunton?

A. They were.

And, being cross-examined by Mr. Washburn, says:

X Q. 7. Have you any firm; and, if so, what, and who compose it?

A. Aaron R. Gay & Co., and it is composed of myself and my nephew, Edwin W. Gay.

X Q. 8. Where is your place of business?

A. No. 130 State street, Boston.

X Q. 9. Have you any way of fixing the exact time when said Dunton purchased of you pencils, as you have testified?

A. No, I have not; excepting, as I have referred to before, that it was probably one or two months from the date of the 9th of November.

X Q. 10. Might it not have been as long as three months or more after that date?

A. Yes, sir.

X Q. 11. You have stated that said Dunton was probably in three times; how long an interval was it between these three times?

A. To my recollection the second time was within a week or ten days from the first; the third time I am not definite.

136 X Q. 12. At which of the times was it that the sale of pencils was made to him, and that he took the piece of rubber, as you have testified?

A. The second time, I should say, to the best of my knowledge; the third time he was in the store I did not serve him; what he purchased at that time I do not know, but, to the best of my knowledge, he was in the store three times.

X Q. 13. Was Edwin W. Gay, your partner, present when he purchased, as far as you know, the Rhoades & Son's, Herrick & Blunt pencils, as you have testified?

A. He was.

X Q. 14. Did you personally sell them to Mr. Dunton, or did your partner, Edwin W. Gay, do so?

A. To the best of my recollection, we jointly sold them.

X Q. 15. Now state how many of those Rhoades & Son's, Herrick & Blunt pencils were sold Dunton on that occasion.

A. No recollection as to number.

X Q. 16. Can you swear that one of them was sold?

A. Yes, sir; that is, I should not have any hesitation to swear.

X Q. 17. Why?

A. Because those pencils were in with other pencils, called Mears & Son's pencils, which have a great reputation, which I showed him in particular, or called his attention to in particular.

X Q. 18. What has that to do with his purchase of the Herrick pencil?

A. He made his own selection.

X Q. 19. Do you mean to state that you remember positively that he did, on that occasion, purchase one of the Herrick pencils?

A. I do not.

X Q. 20. Do you mean to say only that you think he did purchase one of the Herrick pencils on that occasion?

A. I do.

X Q. 21. Why do you think so?

A. Because they were in the box; we had an assortment which we called odds and ends.

X Q. 22. Is that your only reason?

137 A. That is my only reason, excepting his calling for very old pencils.

X Q. 23. Are you able to state whether, if he did purchase one of the Herrick pencils, he purchased any more than one?

A. I am not.

X Q. 24. Have you now stated all your recollection on the subject?

A. I have.

X Q. 25. Did said Dunton ever purchase said Herrick pencil on any other occasion than this on which you think he did purchase one?

A. Not to my knowledge.

X Q. 26. Please look at the pencil now shown you, being deft.'s Exhibit K K, and state if that is the Rhoades & Son's Herrick pencil which you think you and Edwin W. Gay sold said Dunton on the occasion to which you have testified.

A. It is a fac-simile of the Rhoades & Son's pencil; I can't say whether this is the one sold him by us or not. I think the one we sold him had Herrick & Blunt, agents, on it.

X Q. 27. Did you at the time have in the same place Rhoades & Son's pencils, stamped J. K. Herrick & Co., New York?

A. Yes, sir.

X Q. 28. Are you able to swear that the pencil which you think you and Edwin W. Gay sold said Dunton on that occasion was not stamped "J. K. Herrick & Co., New York?"

A. Not positive.

X Q. 29. Are you able to swear that defendant's Exhibit K K, now again shown you, is not that same Rhoades & Son's pencil which you think you and Edwin M. Gay sold said Dunton on that occasion?

A. I am not. My reason is because those pencils are initialed, all kinds according to grade, from H to H, H, H, H, and other letters.

X Q. 30. Did said Dunton on that occasion ask you how long before it was that said Rhoades & Son's Herrick pencils were sold in the market?

138 A. Not to my recollection.

X Q. 31. At the time of the sale of one of said Rhoades & Son's Herrick pencils, which you think was so made to said Dunton, did you have any others of said pencils in your store?

A. We did.

X Q. 32. What has become of them?

A. Some have been sold, to the best of knowledge; some we have still remaining.

X Q. 33. To whom were they sold?

A. To the best of my knowledge, to the gentleman who has just left the room; I don't know his name.

(It is admitted by counsel for complainant that complainant supposes he has purchased, and intended to purchase, all the pencils bearing the mark of Herrick & Blunt and J. K. Herrick & Co., which the witness' firm had.

Counsel for complainant states that he has present a distinguished teacher of many years' standing in the schools of the city of Boston; that he is a material witness, and that his engagements of a public nature are such that it is not convenient for him to attend this examination continuously; and upon this statement counsel asks permission to show to him, in the presence of the examiner and both the counsel on the other side, certain exhibits in this cause, which it is necessary for him to see before he goes on the stand.

Counsel for defendant objects upon the ground that such exhibits can be shown to the witness properly only upon the questions entered upon the record, subject to legal objection; but with a desire to show every courtesy to the witness, offers to now suspend the cross-examination of the witness Samuel S. Gay, and allow this witness now present to be put upon the stand at once.

Counsel for complainant thanks counsel for defendant, and will proceed to examine the witness after having shown him the exhibits.

139 Counsel for defendant objects to the exhibits being shown to the witness at all except upon questions upon the record, after he is sworn, and subject to all legal objection.

The exhibits are produced by the examiner, and, in the presence of both the counsel for defendant, are shown to the gentleman produced by Mr. Blake, and the conversation between Mr. Blake and the person is carried on in an audible tone of voice; and the person is then produced as a witness, and the further cross-examination of the witness S. S. Gay is adjourned to June 26th, 1873, at 10 a. m.)

GEORGE B. HYDE, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and profession?

A. George B. Hyde. I am sixty-two years of age. I reside in Boston. I am a teacher.

Q. 2. How many years have you been a teacher, and in what schools have you taught?

A. Forty-three years; and I have taught six winters, in the first years of my teaching, in the country, where they had only winter schools, for about three months in each year.

Q. 3. Have you ever been connected with the Dwight school in Boston, and how long have you had such connection?

A. I began there as master in 1846; in that building in Concord street.

Q. 4. While you were in Concord street, Mr. James A. Page was your assistant teacher, was he not?

A. He was.

Q. 5. During the period that he was your assistant teacher in Concord street, did you have occasion to visit Mr. Page's room in the schoolhouse, and how frequently?

A. I should think I was in his room some two or three times a
140 week; a part of the time he was master while we were there; the first five or six years, from 1846, he was assistant teacher; then he was made master of the boys, and I had charge of the girls, all in the same building.

Q. 6. And on the occasions when you visited his room, did you have opportunity and occasion to see the writing implements which he had on his desk?

A. Yes, sir.

Q. 7. While the Dwight school was in Concord street, did you ever see in his desk a pencil like defendant's Exhibit E?

A. I did not. I don't remember of seeing that pencil before—I never did.

Q. 8. After the Dwight school removed to Springfield street, did you ever see upon Mr. Page's desk pencils having rubber at one end?

A. I can't fix the time, but I think I have a pencil with a round rubber on the end raised up; with regard to the time, I cannot tell; they were in use in his school and mine.

And, being cross-examined by Mr. Washburn, says:

X Q. 9. How long was Mr. Page your assistant teacher in Concord street—up to what time?

A. I think up to 1851 or '52, my impression is.

X Q. 10. After that time I understand he was the head master of the Dwight boys' school, and you the head master of the Dwights girls' school; is that so?

A. Yes, sir; up to a certain time—up to 1860.

X Q. 11. After he became the head master of the boys' school, and you the head master of the girls' school, did you have any occasion to

make any examination of particular articles which he had in his possession, or upon his desk?

A. I did; the reason is that if he had any pencils that were useful for his, I should like to have them for my school.

X Q. 12. Have you any recollection of any such occasions particularly?

A. I do not remember any particular time that I examined the pencils.

141 X Q. 13. Do you intend to say that you did in fact go to his desk for the purpose of seeing what pencils or articles he had upon it or in use; or only if you happened to see any particular pencils or articles which he used, and which you had not used, they were equally a matter of interest to you?

A. To the first part of that question I wish to answer that I did not go for the purpose of examining his pencils. I do say that I did and should know if he had any such pencils.

X Q. 14. You have stated that at one time you think you saw a pencil upon Mr. Page's desk, having rubber in one end; was it like complainant's Exhibit 10, now shown you?

A. It was not.

X Q. 15. Was it like complainant's Exhibit 9, now shown you?

A. No, sir; I never saw one like it.

X Q. 16. Was the rubber in it inserted in the end of the pencil, similar to that in defendant's Exhibit E, now shown you?

A. I never saw one like it..

X Q. 17. How was the rubber attached?

A. The only one I ever saw that had rubber attached to it, was fastened on to one end, raised up, something like a small ball.

X Q. 18. How long was that after the Dwight school was removed to Springfield street?

A. I could not answer that question directly; I should think that those pencils were in use in our schools between 1856 and 1862, to my best recollection, but I may get that wrong; I don't remember.

X Q. 19. But at any rate it was not till after your school was removed to Springfield street, was it?

A. I think it was not till after.

X Q. 20. When Mr. Page was your assistant teacher, did you have occasion to go into his room more frequently than you did after he became head master of the boys?

A. I think that I did.

142 X Q. 21. After he became head master of the boys, did your duties require you to go to his room?

A. They did not; no more than to any other master in the school.

X Q. 22. When, therefore, you did go, it was only as a matter of a friendly visit, was it?

A. Friendly or business.

X Q. 23. What business?

A. Any business that would be for the interest of my school.

GEO. B. HYDE.

Subscribed and sworn to the 25th day June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till June 26th, 1873, 10 a. m.

BOSTON, *June 26th*, 1873—10 a. m.

Present: Counsel for both parties, as before.

And the witness S. S. GAY, being further cross-examined by Mr. Washburn, says:

X Q. 34. Please look at defendant's Exhibit B B, now shown you, being a piece of India rubber, and answer if you did not give that piece of rubber to said Dunton on the occasion to which you have testified when you sold him the Herrick pencil, and showed him India rubber, as you have testified.

A. No, sir; I did not. I will modify this answer; probably I did.

X Q. 35. Did Mr. Dunton tell you why he wanted this piece of rubber, defendant's Exhibit B B?

A. He did not.

X Q. 36. During the time of your acquaintance with Dunton had he been in the habit of purchasing articles at your store?

A. In former years.

143 Redirect:

Red. Q. 37. In regard to defendant's Exhibit B B, have you any means of ascertaining whether it is the piece of rubber you gave Dunton? And if yea, please do so.

A. I think I have, and I will.

SAMUEL S. GAY.

Subscribed and sworn to this 26th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

S. S. GAY, being recalled as a witness on the part of the complainant, and being further examined by Mr. Blake, says:

Q. 1. Have you, since signing your deposition in this case, made search for means of ascertaining whether the defendant's Exhibit B B is the piece of rubber you gave said Dunton, as requested in the 37th red. q.; and if yea, with what result?

A. I have; it is the piece.

Q. 2. Will you please answer the question more fully?

A. I have found the original piece of rubber that the piece produced was cut from.

Q. 3. Will you please produce it, and make it part of your deposition?

A. The rubber is produced.

(A piece of the rubber is offered in evidence, marked Complainant's Exhibit, S. S. Gay, No. 2, E. G. T., exr.)

Q. 4. What was the shape of this piece of rubber before this piece B B was cut off?

A. A flat, half round rubber bottle, 7 inches by 14 inches; the piece cut from one square corner.

SAMUEL S. GAY.

Subscribed and sworn to this 26th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

144 GEORGE F. MILLIKEN, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

make any examination of particular articles which he had in his possession, or upon his desk?

A. I did; the reason is that if he had any pencils that were useful for his, I should like to have them for my school.

X Q. 12. Have you any recollection of any such occasions particularly?

A. I do not remember any particular time that I examined the pencils.

141 X Q. 13. Do you intend to say that you did in fact go to his desk for the purpose of seeing what pencils or articles he had upon it or in use; or only if you happened to see any particular pencils or articles which he used, and which you had not used, they were equally a matter of interest to you?

A. To the first part of that question I wish to answer that I did not go for the purpose of examining his pencils. I do say that I did and should know if he had any such pencils.

X Q. 14. You have stated that at one time you think you saw a pencil upon Mr. Page's desk, having rubber in one end; was it like complainant's Exhibit 10, now shown you?

A. It was not.

X Q. 15. Was it like complainant's Exhibit 9, now shown you?

A. No, sir; I never saw one like it.

X Q. 16. Was the rubber in it inserted in the end of the pencil, similar to that in defendant's Exhibit E, now shown you?

A. I never saw one like it..

X Q. 17. How was the rubber attached?

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X Q. 18. How long was that after the Dwight school was removed to Springfield street?

A. I could not answer that question directly; I should think that those pencils were in use in our schools between 1856 and 1862, to my best recollection, but I may get that wrong; I don't remember.

X Q. 19. But at any rate it was not till after your school was removed to Springfield street, was it?

A. I think it was not till after.

X Q. 20. When Mr. Page was your assistant teacher, did you have occasion to go into his room more frequently than you did after he became head master of the boys?

A. I think that I did.

142 X Q. 21. After he became head master of the boys, did your duties require you to go to his room?

A. They did not; no more than to any other master in the school.

X Q. 22. When, therefore, you did go, it was only as a matter of a friendly visit, was it?

A. Friendly or business.

X Q. 23. What business?

A. Any business that would be for the interest of my school.

GEO. B. HYDE.

Subscribed and sworn to the 25th day June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till June 26th, 1873, 10 a. m.

BOSTON, *June 26th*, 1873—10 a. m.

Present: Counsel for both parties, as before.

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A. He did not.

X Q. 36. During the time of your acquaintance with Dunton had he been in the habit of purchasing articles at your store?

A. In former years.

143 Redirect:

Red. Q. 37. In regard to defendant's Exhibit B B, have you any means of ascertaining whether it is the piece of rubber you gave Dunton? And if yea, please do so.

A. I think I have, and I will.

SAMUEL S. GAY.

Subscribed and sworn to this 26th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

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Q. 1. Have you, since signing your deposition in this case, made search for means of ascertaining whether the defendant's Exhibit B B is the piece of rubber you gave said Dunton, as requested in the 37th red. q.; and if yea, with what result?

A. I have; it is the piece.

Q. 2. Will you please answer the question more fully?

A. I have found the original piece of rubber that the piece produced was cut from.

Q. 3. Will you please produce it, and make it part of your deposition?

A. The rubber is produced.

(A piece of the rubber is offered in evidence, marked Complainant's Exhibit, S. S. Gay, No. 2, E. G. T., exr.)

Q. 4. What was the shape of this piece of rubber before this piece B B was cut off?

A. A flat, half round rubber bottle, 7 inches by 14 inches; the piece cut from one square corner.

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Q. 1. What is your name, age, residence, and occupation?

make any examination of particular articles which he had in his possession, or upon his desk?

A. I did; the reason is that if he had any pencils that were useful for his, I should like to have them for my school.

X Q. 12. Have you any recollection of any such occasions particularly?

A. I do not remember any particular time that I examined the pencils.

141 X Q. 13. Do you intend to say that you did in fact go to his desk for the purpose of seeing what pencils or articles he had upon it or in use; or only if you happened to see any particular pencils or articles which he used, and which you had not used, they were equally a matter of interest to you?

A. To the first part of that question I wish to answer that I did not go for the purpose of examining his pencils. I do say that I did and should know if he had any such pencils.

X Q. 14. You have stated that at one time you think you saw a pencil upon Mr. Page's desk, having rubber in one end; was it like complainant's Exhibit 10, now shown you?

A. It was not.

X Q. 15. Was it like complainant's Exhibit 9, now shown you?

A. No, sir; I never saw one like it.

X Q. 16. Was the rubber in it inserted in the end of the pencil, similar to that in defendant's Exhibit E, now shown you?

A. I never saw one like it..

X Q. 17. How was the rubber attached?

A. The only one I ever saw that had rubber attached to it, was fastened on to one end, raised up, something like a small ball.

X Q. 18. How long was that after the Dwight school was removed to Springfield street?

A. I could not answer that question directly; I should think that those pencils were in use in our schools between 1856 and 1862, to my best recollection, but I may get that wrong; I don't remember.

X Q. 19. But at any rate it was not till after your school was removed to Springfield street, was it?

A. I think it was not till after.

X Q. 20. When Mr. Page was your assistant teacher, did you have occasion to go into his room more frequently than you did after he became head master of the boys?

A. I think that I did.

142 X Q. 21. After he became head master of the boys, did your duties require you to go to his room?

A. They did not; no more than to any other master in the school.

X Q. 22. When, therefore, you did go, it was only as a matter of a friendly visit, was it?

A. Friendly or business.

X Q. 23. What business?

A. Any business that would be for the interest of my school.

GEO. B. HYDE.

Subscribed and sworn to the 25th day June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till June 26th, 1873, 10 a. m.

BOSTON, *June 26th*, 1873—10 a. m.

Present: Counsel for both parties, as before.

And the witness S. S. GAY, being further cross-examined by Mr. Washburn, says:

X Q. 34. Please look at defendant's Exhibit B B, now shown you, being a piece of India rubber, and answer if you did not give that piece of rubber to said Dunton on the occasion to which you have testified when you sold him the Herrick pencil, and showed him India rubber, as you have testified.

A. No, sir; I did not. I will modify this answer; probably I did.

X Q. 35. Did Mr. Dunton tell you why he wanted this piece of rubber, defendant's Exhibit B B?

A. He did not.

X Q. 36. During the time of your acquaintance with Dunton had he been in the habit of purchasing articles at your store?

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E. G. THOMPSON,
Examiner.

144 GEORGE F. MILLIKEN, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. George F. Milliken. I am thirty-eight years of age. I reside at Boston. I am the manager of the Western Union telegraph office, at Boston.

Q. 2. What is your relation in the Western Union Telegraph Company, at Boston, and have you the custody of the dispatches sent over its wires?

A. I am the manager of their office at Boston, but have no special custody of the dispatches sent over their wires. I have access to the files, and have charge of the office at Boston.

Q. 3. Will you produce a dispatch received at your office on the 1st, 2d, or 3d day of May last, addressed Stephen Thacher & Co., or to P. & S. Thacher, or to P. Thacher, attorneys at law, Boston, and signed A. R. Dunton?

(Objected to by Mr. P. Thacher as leading, as inadmissible in calling for a privileged communication, as incompetent, no foundation having been laid for secondary evidence, and also as immaterial and inadmissible in itself.)

Mr. Ware, of counsel for the witness and the Western Union Telegraph Company, advises Mr. Milliken, in the first place, as respect to fact to answer that part of the question.

And the witness answers: I have been able to find no dispatch with such signature—I should say copy, as the original messages received are not on file at this office. I am advised by my counsel, from the fact that the Western Union Telegraph Company regard communications as privileged, that they should not be produced, except by direct order of the court after hearing the objections, and I therefore decline to produce any dispatch, or the copy, except by order of court.

145 I am advised by my counsel that such communications are privileged by law.

Q. 4. Have you found a dispatch of May 2d, signed Dunton; and if so, will you produce it?

(Mr. Thacher makes the same objections as were made to the previous interrogatory.)

A. I have found no dispatch of May 2d signed Dunton.

Q. 5. Have you found any dispatch or copy signed Dunton, of any date; and if so, will you produce it?

(Mr. Thacher makes the same objections as to previous interrogatory.)

A. I have not found any dispatch or copy signed Dunton, of any date.

Q. 6. Will you produce the Boy's Book, No. 31, of May 2d?

(Same objection as before by Mr. Thacher.)

A. I must decline, for the same reasons heretofore stated, to produce the book, if there be one, except by direct order of the court.

Q. 7. Will you produce the dispatch receipted for in that book, on 2d May, by the signature of P. and S. Thacher?

(Mr. Thacher makes the same objections as before, and as irrelevant.)

A. I do not have access to the original; and if I have access to the copy I must decline to produce it, for the same reasons given before, except upon order of court. I do not admit we have such dispatch or copy.

GEORGE F. MILLIKEN.

Subscribed and sworn to the 26th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

146 PHILARMAN RUGGLES, a witness produced on the part of the

complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. Philarman Ruggles. I was 75 last April. I reside at Milton, Mass. I am a farmer.

Q. 2. Do you know James Sumner, of Milton, who is here present, and how long have you known him?

A. I have known him ever since he was a boy. I have lived in Milton for more than 30 years.

Q. 3. What is his general character among his neighbors for truth and veracity?

A. As to that matter, in the first place, I never had any difficulty with Mr. Sumner, only he once gave me the same as the lie, which he asserted I must be mistaken. In regard to that point I have no further to say, at any rate. As to his general reputation, so far as my knowledge is concerned, is very bad for truth and veracity, as I took it from other people.

(Defendant's counsel objects to this testimony, on the ground that such other people should be produced.)

And being cross-examined by Mr. Washburn, says:

X Q. 4. Please state the matter as to which you say said Sumner gave you the lie.

A. That is, I should state it thus: He virtually gave me the lie by the assertion that I was mistaken, which I could by no possibility be. The fact was, we had a road in contemplation, and there was a class of people to oppose it, and Mr. Sumner appeared on behalf of the opposers to oppose the road. After the meeting was over I spoke to Mr. Sumner, and told him I was astonished he was opposing the road. He said that he was not so much opposed to the road, but he was hired to oppose it. I then asked him what he had, and he told me he had $10. I laid this to his charge at a town meeting, and this brought up
147 the answer that he made to me that I was mistaken, and I didn't think there was any possibility of being mistaken about it.

X Q. 5. When was that town-meeting held; how long after the conversation?

A. I can't tell you exactly the time; the conversation was, I think in October, and the town meeting the following March. The conversation might have been earlier or later.

X Q. 6. The conversation occurred, did it not, at the time the county commissioners met on the subject of the road?

A. Yes, sir.

X Q. 7. Now, was not that, in fact, about or nearly a year before that town meeting?

A. No, sir; I think not.

X Q. 8. Mr. Sumner appeared as attorney for the opposers of that road, did he?

A. He said so.

X Q. 9. Why did you charge him in the town meeting, as you have stated?

A. Because, sir, he represented himself in the town meeting as not being opposed to the road—so much opposed to the road—but afterwards that he represented he was employed to oppose the road.

X Q. 10. Were you in favor of the road?

A. I was.

X Q. 11. Why?

(Objected to as immaterial.)

A. Because I considered the public required the road to be built, for one thing, and another is, that it run through the land of my son, and would probably augment the value of his land whenever it was built; and because he was my son, I was in favor of it.

X Q. 12. You didn't much like it, did you, that Mr. Sumner opposed the road?

A. To speak the plain truth about it, didn't think much of Mr. Sumner's being opposed to the road, as I didn't think his influence would amount to anything.

X Q. 13. Why were you astonished at his opposing the road?

148 A. On no particular ground; except that, situated as he was, that he'd be in favor of the road to benefit the people.

X Q. 14. Did he know that it would open your son's land and greatly increase its value?

A. I presume that he must know it.

X Q. 15. Didn't Mr. Sumner claim that it was improper for your son to be on the board of selectmen, because the road went through your son's land, and it was improper that he should be in a position to assess betterments or damages on his own land?

A. I have no recollection of Mr. Sumner's saying it was improper for him to be on the board of selectmen and assessor. He had no ground to make such, as my son was not then selectman or assessor when the road was laid out or damages awarded.

X Q. 16. Do you mean to say that betterments have been awarded at all yet in that matter?

A. They have, sir.

X Q. 17. Who awarded them?

A. The county commissioners.

X Q. 18. They awarded only land damages, did they; they did not award betterments?

A. It is all, sir. They awarded a Miss Churchill, I understood, $400. The betterment law was not passed then. It was not passed till last March meeting.

X Q. 19. You mean, do you not, that the betterment law was not accepted by the town of Milton till last March meeting; the law itself was passed some years ago by the legislature, was it not?

A. Yes, that's how I understood it was.

X Q. 20. Was not your said son a candidate for the position of selectman and assessor the last March meeting?

A. He was.

X Q. 21. Now, don't you know that Mr. Sumner opposed him on the ground that he would be required, as part of his duties, to assess betterments in this road matter, which went through your son's own land?

A. I do not know it; I don't know that he opposed it in any way.

X Q. 22. Was it not on account of just that opposition by Mr.

149 Sumner, to your son being selectman and assessor, that you charged Mr. Sumner in that town meeting with having received money to oppose the road?

A. No, sir.

X Q. 23. What had Mr. Sumner said in that town meeting which called for that charge by you? State his words or their substance.

A. He stated that he had not received a dollar for opposing the road.

X Q. 24. Did he state that after you so charged him with receiving money for opposing it?

A. I won't say, sir, certainly which it was; I made a remark in answer to his argument opposing the road; that is, I wished the town to understand that he was hired to oppose the road.

X Q. 25. What was the exact question before the town-meeting which Mr. Sumner so argued, and in answer to which argument you so charged him?

A. I cannot tell exactly what the point was in discussion, but I believe it was on the point of accepting of the betterment law.

X Q. 26. The road had already been laid out by the county commissioners some time before the town-meeting, had it not?

A. It had been, and partially made.

X Q. 27. Was not the question before the town-meeting the election of selectmen and assessment of betterments in that road matter?

A. Not that I know of.

X Q. 28. Do you mean to swear that that was not the question?

A. I swear I did not know it was the question; I speak as far as my knowledge.

X Q. 29. You have stated, in your answer to the 24th x q., that you made a remark in answer to Mr. Sumner's argument, at the town-meeting, opposing the road; and in your answer to the 26th x q. you state the road had already been laid out by the county commissioners some time before the town-meeting, and partially made; please explain.

A. I can't explain it no farther than this way; he was arguing
150 on the acceptance of the betterment law, and he took upon him to state that he was opposed to the road, and gave his opinion of what the expense would be to the town, which was a statement that it would probably cost $20,000.

X Q. 30. Did not Mr. Sumner, at that town-meeting, make a motion to suspend the matter of the election of selectmen, and to take up the article in the town warrant upon the acceptance of the betterment law; and was it not upon this motion that he made the argument you have referred to, and in answer to which you got up and charged him publicly in town-meeting with being paid, which he has publicly then and there denied?

A. I have no positive recollection of his making that particular motion, but he might; he made so many. I would state here that the selectmen were chosen previous to the argument he made; I think that is the case; that is my impression, but I may be mistaken.

X Q. 31. Mr. Sumner explicitly and publicly denied your charge, did he not, in the town-meeting?

A. No, sir; he did not in open meeting. It was in private conversation between him and me.

X Q. 32. When did he give you the lie—was that in public town-meeting?

A. It was in this private conversation.

X Q. 33. Who were present beside you and he?

A. Well, sir, I can't tell. They sat as closely as they could sit.

X Q. 34. Then it was in town-meeting, was it not?

A. Town-meeting had not closed.

X Q. 35. Did those who were sitting all around hear him so give you the lie?

A. I don't like to have it go as giving the lie. I have stated that he stated I was mistaken.

X Q. 36. Why, then, did you say, in answer to the 3d question, that he gave you the same as the lie?

A. Because I didn't conceive there was any chance for any mistake about it.

X Q. 37. Did you consider that he thought you were telling a lie?
A. I don't know his thoughts.
151 X Q. 38. Did you take his answer as a charge of falsehood?
A. I consider it was so.
X Q. 39. Were you angry at it?
A. As to that, it is a peculiar question to answer. No, sir; I was not in anger.
X Q. 40. Have you ever since had any conversation with him on that subject?
A. Not that I recollect.
X Q. 41. Do you know, aside from what you say Mr. Sumner said to you at that conversation, when the county commissioners met, whether Mr. Sumner did or did not receive pay, in fact, for opposing that road?
A. I did not know it. I don't know that he did.
X Q. 42. Who were present when Mr. Sumner, as you charged him, said that he did receive pay for opposing the road?
A. I can't say, or call them by name. I can call some of them. We were all passing out of the hall. I cannot say who heard it. There were there Mr. Edward Cunningham. The meeting closed, and we were all going out together.
X Q. 43. Was not Thomas Hinckley there, and did not he hear the conversation?
A. He was there, but whether he heard the conversation I know not.
X Q. 44. You have said, in answer to the 3d question, "As to his general reputation, so far as my knowledge is concerned, it is very bad for truth and veracity, as I took it from other people." Now, state the names and residences of those other people, and all of them.
A. I don't know as I am required to state the names; I don't think I am.
X Q. 45. Do you decline to so state?
A. I do. I consider this question asked me as to Mr. Sumner's general reputation and character, that I was under no necessity to call names in regard to it.
X Q. 46. Are you able to mention the names?
A. I decline to answer that question.
(Counsel for defendant requests the examiner to instruct the wit-
152 ness that he is bound to answer these questions which he has declined to answer, and has no right to refuse to do so.
Mr. Blake concurs in this request.
The witness is so instructed by the examiner.)
The witness now answers: I can name a few; and can't name but a few:
David W. Tucker, Milton.
John Myers, "
J. W. Bradlee, "
Nobody else; I won't mention any more.
X Q. 47. Can you mention any more?
A. I decline answering the question.
And being instructed to answer the question says:
A. I can't mention any more who have directly accused him in regard to his veracity for truth.
X Q. 48. What did David W. Tucker say, and when and where?
A. I once heard him state, in the town-house, that Mr. James Sumner was not to be believed in any way. I heard him state that at the last March meeting.

X Q. 49. Is that the only time you ever heard said Tucker so state, or to that effect?

A. I have had various conversations with him on that subject, but can state no particular time. I recollect some of the places where we had the conversations—at Mr. Durell's store.

X Q. 50. Said Tucker was in favor of laying out the road to which you have referred, was he not?

A. I don't know particularly what his feelings were about it.

X Q. 51. Don't you know that said Tucker had previously had a personal difficulty with said Sumner, and assaulted him?

A. I did not know it.

X Q. 52. Did you not hear of it?

A. I did not.

X Q. 53. Did you not know that there was a political trouble or
153 controversy between them the summer before, in which articles were published in the newspaper by each in reference to Tucker's being a Greeley man?

A. Not that I know of. I barely heard that articles were printed. I never read them, and never saw them.

X Q. 54. What did John Myers tell you in regard to said Sumner's character, and when and where?

A. To-day; coming into Boston. He made the statement he was not to be believed in the cars.

X Q. 55. Both you and he were coming in, were you not, upon subpœnas to be witnesses in this matter for the purpose of impeaching said Sumner?

A. We did not know that Mr. Sumner was concerned in it till after we arrived at this house. We did not know what the object was. Our business in coming in was to testify in this case here.

X Q. 56. Don't you know that said Sumner sued said Myers, and has had on acrimonious lawsuit with him?

A. I knew the family had a lawsuit, but it was the brother of Mr. Sumner that was the plaintiff, if I understood it right.

X Q. 57. Was not this Mr. Sumner an attorney for plaintiff in this case?

A. I suppose he was. I know he acted as attorney.

X Q. 58. Now, were you not, yourself, one of the referees in that case?

A. I was.

X Q. 59. Is not that lawsuit still pending?

A. It never came to a close. It was adjourned most three years ago.

X Q. 60. What did J. W. Bradlee tell you about said Sumner's character, and when and where?

A. Since he came here to-day for this examination, in this house. He said he wasn't to be believed.

X Q. 61. Said Bradlee was called as a witness to-day the same as you, was he not?

A. I expect so. I wish to say that I have had other conversations with Mr. Bradlee about Mr. Sumner, and they were against his good reputation.

X Q. 62. How many and when, each?

A. I can't tell how many; nor can I tell when they were.

154 X Q. 63. State as near as you can.

A. Within five years.

X Q. 64. Do you remember any specific conversation during that time to that effect with him?

A. I cannot say.

X Q. 65. Don't you know that there has been a controversy between said Bradlee and said Sumner, in which articles were published in the newspapers against each other with reference to the decoration of soldiers' graves in Milton, and action thereon in town-meeting?

A. All I know about it is, I heard there were such pieces in regard to that subject. I never saw them or asked about them.

X Q. 66. You are very deaf, are you not; and how long have you been so?

A. Not very deaf. I have been growing gradually deaf for five years; now I am considerably deaf.

PHILARMAN RUGGLES.

Subscribed and sworn to this 26th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till this day at 4 p. m.

BOSTON, *June* 26, 1873—4 p. m.

Met pursuant to adjournment.
Present, counsel as before.

J. WALTER BRADLEE, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. J. Walter Bradlee. I am thirty-two years of age. I reside at Milton. I am a nurseryman.

Q. 2. Do you know James Sumner, who is here present, and how long have you known him?

155 A. I do; I have known him ever since I was a boy.

Q. 3. Do you know what his character is for truth and veracity among his neighbors, and those among whom he has lived? and if yea, please state what it is.

A. Bad.

Q. 4. You say you are a nurseryman; please state what that is.

A. It is a party that grows and sells trees and shrubs.

And being cross-examined by Mr. Washburn says:

X Q. 5. What reason have you for stating that the character of said Sumner for truth and veracity is bad?

A. I judge from the general speech of people.

X Q. 6. State whom, and all of whom, you have heard speak of the character of said Sumner for truth and veracity.

A. I don't know as I have got time to state all of whom; I can state such as come into my mind at the present moment. Mr. David W. Tucker, Edward L. Pierce, Samuel B. Noyes, and others. I cannot say whom that I have heard say point-blank these words, but it is the general speech of people.

X Q. 7. Can you name any other persons whomsoever whom you have ever heard say, point-blank, that said Sumner's character was bad for truth and veracity, or to that effect, except said David W. Tucker Edward L. Pierce, and Samuel B. Noyes? and if you can, name them.

A. Yes. I have heard Mr. John Myers. I have heard Mr. Philarman Ruggles. I can't at this moment call other names to my mind.

X Q. 8. Where do all the persons whom you have named reside?

A. They all, with one exception, reside in Milton; that of Samuel B. Noyes, he resides in Canton.

X Q. 9. What did David W. Tucker say to you about it; when, and where?

A. I can't call to mind the time and place; the sum and substance of his remark was that he was a damned liar.

X Q. 10. Can you name any time and place when he said that?

156 A. I don't know as I could with any positiveness.

X Q. 11. State how long ago it was, as nearly as you can.

A. It was along last fall; several times during the fall.

X Q. 12. What was the occasion of his saying that to you?

A. His name was brought up during remarks that was made, and he used that expression.

X Q. 13. Who made those remarks, what were they, and who brought up his name?

A. I don't remember now.

X Q. 14. Who were present?

A. I can't call to mind.

X Q. 15. Where was it?

A. At different places.

X Q. 16. Can you state any of them? if so, please do so.

A. One instance, in particular, I call to mind was at the cattle fair at Readville.

X Q. 17. What time in the day?

A. I should say from one to two o'clock in the afternoon; I don't remember the time exactly.

X Q. 18. Do you not know that previously, on that very day, said Tucker and said Sumner had had a personal difficulty?

A. I have heard so since.

X Q. 19. Do you not know that previously, on the same day, said Tucker assaulted said Sumner?

A. No, sir.

X Q. 20. Have you not heard that they had then a personal collision?

A. No, sir.

X Q. 21. Can you specify any other occasion when you heard said Tucker speak against the character of said Sumner for truth and veracity? if so, state it, and the time and place.

A. I can't the time and place; but I am positive on various occasions I heard him.

X Q. 22. How long were those other "various occasions" after the said fair?

157 A. Through the last fall and winter.

X Q. 23. What did Edward L. Pierce say to you, and when, and where?

A. I can't recall his words; it was to the effect that you could not place any dependence in James Sumner. I can't recall the time or place; I know it was on the cars.

X Q. 24. What was the occasion of his saying that to you?

A. The matter was brought up during our remarks; we were talking about various matters and things, and Sumner's name was brought up, and the substance of his remark was what I have said.

X Q. 25. What were those "various matters and things," or any of them?

A. Commonplace remarks, such as one man makes to another when they meet. I can't recall it.

X Q. 26. Can you state any of them?

A. I don't think I can.

X Q. 27. Who first spoke of said Sumner in that conversation?

A. I don't remember.

X Q. 28. What was said when he was first spoken of?

A. I can't recollect.

X Q. 29. Did said Pierce make that remark about said Sumner in answer to any other remark?

A. I don't remember now.

X Q. 30. Do you remember anything that occurred in that conversation?

A. I don't think of anything.

X Q. 31. Was any one present at that conversation except you and Lincoln?

A. It was in a railroad-car. There was not any one present with us. We were sitting on a seat together. The car was full.

X Q. 32. What did Samuel B. Noyes say to you about said Sumner's character, and when, and where?

A. He said he was a liar and a rascal on different occasions; I can't call to mind for the last three or four years.

158 X Q. 33. Did he give you any reason for saying that?

A. No, sir.

X Q. 34. Can you specify any occasion when he said it?

A. No.

X Q. 35. Do you not know that said Noyes and said Sumner had previously had a quarrel, and were on very unfriendly terms?

A. I had no positive knowledge that they were.

X Q. 36. Were you not so informed?

A. I have heard so. I have no positive knowledge from either of the parties.

X Q. 37. How happened you to talk with said Noyes about said Sumner?

A. I don't remember.

X Q. 38. Did you ever talk with him about said Sumner in Milton or Canton?

A. Not that I can recollect of.

X Q. 39. Did you ever talk with him about him in Boston?

A. I have talked with him when his name was brought up in Boston.

X Q. 40. Whereabouts in Boston?

A. Walking on the streets.

X Q. 41. What streets?

A. I can't recall to mind what streets.

X Q. 42. Can you specify any time whatever?

A. No, sir.

X Q. 43. Who first spoke of said Sumner, you or said Noyes?

A. I don't recollect.

X Q. 44. What was the occasion at any time of his being spoken of at all?

A. I can't recall now the occasion.

X Q. 45. What did John Myers say to you about said Sumner's character, and when and where?

A. On different occasions he spoke of his reputation as being bad. I can't recall to mind the time and place.

X Q. 46. Can you specify any occasion whatever?

A. I don't know as I can.

159 X Q. 47. What reason did he give for thinking his reputation bad?

A. I don't remember.

X Q. 48. Did he tell you he had a lawsuit with said Sumner?

A. No, sir. The lawsuit was with Sumner's brother.

X Q. 49. James Sumner was the attorney in the lawsuit against said Myers, was he not?

A. I don't know.

X Q. 50. Have you not been so informed?

A. Not that I remember of.

X Q. 51. Your father is a deputy sheriff, is he not?

A. Yes, sir.

X Q. 52. Don't you know that he served the writ in that lawsuit on Myers?

A. No, sir.

X Q. 53. Don't you know, or have you not heard, that said Myers and said James Sumner have been on unfriendly terms?

A. No, sir.

X Q. 54. What did Philarman Ruggles say to you about said Sumner's character, and when and where?

A. He said his character was bad; I think, on one occasion, at the town-hall in Milton, and on another occasion at Durell's store.

X Q. 55. How happened the subject to be spoken of on those occasions?

A. I don't know as I can tell. They were brought up during remarks.

X Q. 56. What remarks?

A. Commonplace remarks.

X Q. 57. Who made them?

A. Mr. Ruggles.

X Q. 58. Did anybody else make any?

A. I don't remember any.

X Q. 59. Do you remember any remark that was made by anybody on those occasions?

A. Not of any benefit to Mr. Sumner. I cannot recall the exact words.

X Q. 60. Can you state the substance of any remark that was made on those occasions?

160 A. The sum and substance was that you could not put any dependence on what Sumner said.

X Q. 61. Who was present on those occasions?

A. I don't remember now.

X Q. 62. Was any one beside you and Ruggles?

A. I think there was.

X Q. 63. Can you specify anybody?

A. I don't know as I can.

X Q. 64. Is your memory good or bad?

A. Fair to medium.

X Q. 65. Why do you remember that something was said against said Sumner's character, and can't remember anything else?

A. These questions brought it to mind.

X Q. 66. Are you friendly to said Sumner?

A. Yes, sir.

X Q. 67. Have you ever had any difficulty or controversy with him?

A. I don't know as I have, personally, with him.

X Q. 68. What do you mean by the last answer?

A. I mean that we have not always thought alike on the same subject.

X Q. 69. Have you not recently had with said Sumner a newspaper controversy?

A. Not that I am aware of; no positive knowledge that I have.

X Q. 70. Have you had a newspaper controversy at all; and, if so,

over what name were your articles, and over what name were the opposing articles, and what was it about?

A. I have had a controversy. They were over my own name, and the opposing articles were over the name of "Other side." They were about town affairs.

X Q. 71. What, particularly, were they about?

A. There was but one article and the answer. It was about the matter of appropriation of money for decoration services of soldiers' graves.

X Q. 72. Was that not the subject of action at town-meeting in Milton?

A. The subject was acted on in town-meeting.

161 X Q. 73. Did said Sumner speak on the subject in town-meeting?

A. I don't think he did at the last; I don't remember. He did in 1872.

X Q. 74. Did he favor or oppose such an appropriation at either year?

A. He raised the question of the legality and policy of the act in the meeting of 1872.

X Q. 75. Did you not understand and suppose at the time that the newspaper articles over the signature "The other side" were written by said Sumner?

A. No, sir; not at the time.

X Q. 76. Did you afterwards?

A. No, sir; I had no positive knowledge.

X Q. 77. Question repeated.

A. I can't say that I did.

X Q. 78. Who did you suppose wrote them?

A. I decline to answer—I can't. I don't know.

X Q. 79. At the town-meeting in 1872, was not the question voted on of the location of a memorial hall at the Lower Mills, in Milton?

A. I think not in 1872. It was in 1871, I think.

X Q. 80. Did you support the location of such a memorial hall?

A. Yes, sir.

X Q. 81. Did said Sumner oppose it?

A. Yes, sir.

X Q. 82. Did he succeed in defeating it?

A. It was defeated. I was not aware that he was the party.

X Q. 83. Did you not charge him at the time with being instrumental in defeating it?

A. He aided in its defeat, but did not defeat it alone.

X Q. 84. Question repeated.

A. Not that I remember.

X Q. 85. Did you not, at the termination of that town-meeting, assail him with angry words, because he opposed the location of such memorial hall?

A. Not that I remember of.

X Q. 86. Did you not do so when you were taking your horse

162 from the meeting-house shed to go home, after the town meeting, in the presence of your father and the presence of Rufus W., the brother of said Sumner?

A. I don't remember of it.

X Q. 87. Did you not then and there tell him he was a damned coward, because he did not go to the war, or words to that effect?

A. I may have said it. I don't remember.

X Q. 88. You were a soldier in the war, were you not?

A. Yes, sir.

X Q. 89. Was said Sumner popular with those in Milton who had been soldiers in the war, or otherwise?

A. I think not.

J. WALTER BRADLEE.

The further cross examination of this witness is adjourned to June 27, 1873, at 10 a. m.

BOSTON, *June* 27, 1873—10 a. m.

Present—Counsel for both parties, and the witness.

J. WALTER BRADLEE, being further cross-examined by Mr. Washburn, says:

X Q. 90. Are you now able to give any more definite answers to the 85th, 86th, and 87th cross-questions?

A. I remember of speaking with Mr. Sumner, but what my exact words were I can't say now.

X Q. 91. State their substance?

A. They related to the memorial hall; I can't tell what the conversation was.

X Q. 92. Can you tell any of the conversation?

A. No, sir.

X Q. 93. Why did you say, in answer to the 87th cross-question, that you may have said he was a damned coward because he did not go to the war, or words to that effect?

A. Because I can't say that I didn't say it.

X Q. 94. Where is Edward L. Pierce now?

163 A. Can't tell; abroad, I think; he went to Europe; my last letter from him was in May last, stating he was about to sail for Europe.

X Q. 95. Do you remember about the trouble between Philarman Ruggles and said Sumner about the laying out the road through the land of Ruggles' son?

A. I heard remarks pass between the two. I could not state the substance of them. In town-meeting, you mean?

X Q. 96. In answer to the 73d cross-question, you state there was but one article and the answer in your newspaper controversey about the matter of appropriation of money for the decoration of soldiers' graves. Now, were there not, on the contrary, two articles published by you and two by "Other side?"

A. As I meant to state, I wrote an article, and it was answered by "Other side," and I replied, and "Other side" replied again.

X Q. 97. Please look at the book now shown you, on pages 126, 127, 128, and 129, purporting to be newspaper extracts, and state if those are not the articles referred to in your newspaper controversy in your last answer, and all of them?

(Objected to as to form and substance.)

A. They are.

(Counsel for defendant offers the pages in evidence; and the pages are cut from the book, marked "Deft.'s exhibit L. L., J. W. Bradlee, E. G. T., Exr.")

X Q. 98. Was not said Sumner formerly the teacher of the school in your own district in Milton?

A. He was a substitute there for a month or two, a short time, while the teacher was sick.

X Q. 99. He has, the last few years, taken an active and decided part in town affairs and questions, and in politics in Milton, has he not?

A. He has taken an active part in town affairs. I suppose he has, in one sense, in politics; not so active, though, as in town affairs.

164 X Q. 100. Have you and said Sumner been most generally on opposite sides in said town affairs and questions?

A. I think we have.

X Q. 101. Did you support Grant or Greeley in the last campaign?

A. Grant.

X Q. 102. Which did Sumner support?

A. I can't swear whom he supported. I could not swear whom he voted for. He took part for Greeley in the commencement of the campaign, but whom he voted for I don't know.

X Q. 103. Don't you know that he distributed Greeley tickets at the election? And did you not distribute Grant tickets?

A. I know he had Greeley tickets in his possession. I distributed Grant tickets.

X Q. 104. Don't you know, or did you not hear, that said Sumner was the secretary of the Greeley organization, in the Norfolk district, including said Milton?

A. I knew he was a delegate to about all the liberal-republican conventions from Milton; I think the only one from Milton. I don't remember hearing that he was secretary.

X Q. 105. Was there not a good deal of bitter party feeling between the supporters of Grant and Greeley in Milton?

A. Not that I was aware of. There wasn't enough of the Greeleyites to show spite towards. There were only fifteen or twenty of them.

X Q. 106. Do you mean there were only fifteen or twenty of them, including the democrats?

A. No, sir; I mean only fifteen or twenty who seceded from the republican ranks.

X Q. 107. Did said Sumner secede from the republican ranks?

A. The only knowledge I have of Sumner is that he voted for Grant at his first election.

X Q. 108. Don't you know that said Sumner was the subject of personal and newspaper attack and criticism in Milton by reason of his political course?

165 A. I know he was in one case with David W. Tucker.

X Q. 109. Is that the David W. Tucker you have already mentioned?

A. The same.

X Q. 110. Did not said Tucker attack said Sumner on the street last fall, and threaten him with his whip, after said Tucker had been elected by the Greeley organization a delegate to Greeley conventions and member of the Greeley town committee?

A. I have no knowledge of it.

X Q. 111. Did you not so understand at or about the time?

A. No, sir.

X Q. 112. Did you ever hear so?

A. No, sir.

X Q. 113. Do you not know that said Tucker had a personal controversy in the street with said Sumner, last fall, of some kind?

A. I heard they had some talk.

X Q. 114. Of what nature, whether angry or otherwise?

A. I don't know.

X Q. 115. What did you understand from what you heard?

A. I understood Mr. Tucker asked Mr. Sumner by what authority he had used his name in connection with the liberal-republican caucus, or words to that effect.

X Q. 116. Is that everything that you heard about it?

A. That is all I remember.

X Q. 117. Don't you remember hearing that Tucker threatened to thrash said Sumner on that occasion?

A. I don't think I heard he threatened to thrash him.

X Q. 118. What did you hear?

A. I don't remember.

X Q. 119. Did not said Tucker abuse said Sumner you in foul or abusive language?

A. He made the statement which I made in connection with Tucker yesterday.

X Q. 120. Was that in connection with his talking with you about that street affair which he had with Sumner?

A. No, sir.

166 X Q. 121. How long after was it?

A. That was before I had heard anything about this street affair.

X Q. 122. How long before you heard it?

A. I can't say.

X Q. 123. State as nearly as you can?

A. It was last fall.

X Q. 124. How long after this street difficulty between them did you hear about it?

A. It was between then and the November election; I can't state the time.

X Q. 125. Now, have you not abused said Sumner in words, and endeavored to injure him with a great many persons in the town of Milton?

A. I have talked with parties about Sumner.

X Q. 126. Did you speak well of him or otherwise?

A. I have done both.

X Q. 127. Have you spoken well of him within the last year?

A. I think I have.

X Q. 128. Why did you speak well of him?

A. The same as any one would speak well of a man.

X Q. 129. Do you consider him an honest man?

A. He is not a man I should have great confidence in.

X Q. 130. Do you consider that he is not an honest man?

A. Yes, sir.

X Q. 131. Why, then, did you speak well of him?

A. I said he was smart at speaking. He made some very good points. That's what I said.

Redirect:

Re-D. Q. 132. Who is Edward L. Pierce, and what public positions has he held?

(Objected to because he is not a witness, nor is proved to have said anything necessarily contradicting the good character of said Sumner for truth and veracity.)

A. He is at present secretary of the state board of charities.

167 Re-D. Q. 133. The Mr. Tucker mentioned by you has been in the house of representatives from the district in which Milton is for two years, has he not?

A. Yes, sir.

Re-D. Q. 134. When you wrote the newspaper articles metioned by you, did you know who the writer of "Other side" was?

A. No, sir.

Re-D. Q. 135. Were you subpœnaed to come here, and did you receive $2.20 fees for coming?

A. Yes, sir.

J. WALTER BRADLEE.

Subscribed and sworn to this 27th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

JOHN MYERS, a witness produced on the part of complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. John Myers. I am sixty-three years of age. I reside at Milton. I am in the ice business and farming.

Q. 2. Do you know James Sumner, of Milton, and how long have you known him?

A. I know him, and have known him some twenty or twenty-five years, I should think.

Q. 3. What is his general character among his neighbors and townsmen as to his truth and veracity?

A. In my neighborhood it is bad.

Q. 4. Do you know Mr. J. Walter Bradlee, of Milton, and what position, if any, does he hold in the town?

(Objected to as not competent, and immaterial.)

A. I do; he is school-committeeman and justice of the peace.

168 And being cross-examined by Mr. Washburn says:

X Q. 5. When the last question was asked you, Mr. Illfelder, who is now present, suggested to you that said J. W. Bradlee was a justice of the peace, did he not?

A. Yes, sir; he did. I couldn't recollect.

X Q. 6. Were you present yesterday when the examiner excluded from the room all witnesses for the impeachment of said Sumner, except the one being examined at the time, and did you not then leave the room?

A. I was present, and I did leave the room.

(The examiner here states that soon after the commencement of the examination of the witness Ruggles all other witnesses on the part of the complainant were excluded from the room, at the request of counsel for defendant.)

X Q. 7. Did you not afterwards, while the said witness, J. W. Bradlee, was being examined in this room, with the door open, stand in the hall around the corner of the passage, but out of sight from this room, listening to his testimony?

A. About three or four hours after, I got tired of sitting up in the room; I came down and walked across the entries, came to the door, and walked several times across the entries, and came to the corner the gentleman speaks of, and stopped there for a minute; don't think I stopped over a minute at a time; then walked through the entries again, and might have stopped half a minute—not more than that—and turned to walk backward and forward; did not hear anything, to understand it, what was going on in the room—not a word of it—not a single question.

X Q. 8. Have you had any talk with said Bradlee since he was examined yesterday afternoon?

A. Well, I might have asked him some questions. I don't recollect now what it was.

X Q. 9. Have you had any talk about this matter with Philarman Ruggles since he was examined yesterday afternoon?

A. No, sir. I have not seen the man.

169 X Q. 10. Was your talk to said Bradlee in reference to this case?

A. I think I asked him how he got along. I don't recollect of anything. I think he said he got along pretty well. I don't think I could tell exactly what he did say.

X Q. 11. You and said Bradlee went back to Milton together last night, did you not.

A. No, sir; we did not go to Milton together.

X Q. 12. How far did you go together?

A. We went as far as Mattapan Station.

X Q. 13. Did you occupy the same seat in the cars?

A. Yes, sir; we did.

X Q. 14. State who are the residents in your neighborhood?

A. We call neighbors some distance, located as we are.

X Q. 15. What did you mean, in your answer to the third question, by "neighborhood?"

A. I meant our part of the town—towards the west part of the town.

X Q. 16. Is there any village there?

A. No, sir; there is no village there.

X Q. 17. Are there many residents there?

A. No; not a great many.

X Q. 18. The population is scattered somewhat, is it not?

A. Yes, sir.

X Q. 19. Now state the names of all of them.

A. I don't know all of them in the west part of the town.

X Q. 20. State all you do know.

A. Mr. Davenport's—several families—I don't know all their first names; I know some of them: Lewis Davenport, Nathaniel Davenport, Mr. Holmes—I can't recollect his first name; Mr. Bronsden—I think James Bronsden, Mr. John Bradlee, Mr. Lemuel W. Babcock, Mr. Joseph Kendall, Mr. Murphy—James, I think, but I am not certain, Mr. Charles Tucker, John Welsh, Benjamin Lyons. I can't think of

170 half of their names. There is Stillman Tucker, Mr. Walter Bradlee. There are several others, but I cannot think of their names—Abraham Holmes.

X Q. 21. Why do you say that in your neighborhood said Sumner's general character for truth and veracity is bad?

A. Because I hear more, and pretty much the heft of what I hear is in that neighborhood—a good many in blacksmith's shop that meet there to have shoeing and business done there, where these things are talked over a good deal. News comes there from all parts of the town when they collect in the blacksmith's shop. Mr. Blackman keeps the blacksmith's shop.

X Q. 22. Now state the names of all the persons you have ever heard speak of the general character of said Sumner for truth and veracity as bad.

A. I could not name a quarter part of them to save my life. People that I don't know.

X Q. 23. Can you name anybody; and, if so, name all you can?

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A. We went as far as Mattapan Station.

X Q. 13. Did you occupy the same seat in the cars?

A. Yes, sir; we did.

X Q. 14. State who are the residents in your neighborhood?

A. We call neighbors some distance, located as we are.

X Q. 15. What did you mean, in your answer to the third question, by "neighborhood?"

A. I meant our part of the town—towards the west part of the town.

X Q. 16. Is there any village there?

A. No, sir; there is no village there.

X Q. 17. Are there many residents there?

A. No; not a great many.

X Q. 18. The population is scattered somewhat, is it not?

A. Yes, sir.

X Q. 19. Now state the names of all of them.

A. I don't know all of them in the west part of the town.

X Q. 20. State all you do know.

A. Mr. Davenport's—several families—I don't know all their first names; I know some of them: Lewis Davenport, Nathaniel Davenport, Mr. Holmes—I can't recollect his first name; Mr. Bronsden—I think James Bronsden, Mr. John Bradlee, Mr. Lemuel W. Babcock, Mr. Joseph Kendall, Mr. Murphy—James, I think, but I am not certain, Mr. Charles Tucker, John Welsh, Benjamin Lyons. I can't think of

170 half of their names. There is Stillman Tucker, Mr. Walter Bradlee. There are several others, but I cannot think of their names—Abraham Holmes.

X Q. 21. Why do you say that in your neighborhood said Sumner's general character for truth and veracity is bad?

A. Because I hear more, and pretty much the heft of what I hear is in that neighborhood—a good many in blacksmith's shop that meet there to have shoeing and business done there, where these things are talked over a good deal. News comes there from all parts of the town when they collect in the blacksmith's shop. Mr. Blackman keeps the blacksmith's shop.

X Q. 22. Now state the names of all the persons you have ever heard speak of the general character of said Sumner for truth and veracity as bad.

A. I could not name a quarter part of them to save my life. People that I don't know.

X Q. 23. Can you name anybody; and, if so, name all you can?

A. Yes, sir; John Bradlee and J. Walter Bradlee, David Tucker; I could not recall quarter part the names; I think young Abraham Holmes, I won't say positively; I can't think of the names of any more at this present time, but it is the general conversation in the shop at some times.

X Q. 24. John Bradlee is the father of J. W. Bradlee, who has been a witness here, is he not?

A. Yes, sir.

X Q. 25. Has not David Tucker got a middle letter W in his name?

A. I do not know.

X Q. 26. What is his business?

A. I think he is a farmer.

X Q. 27. Did he use to be a milkman?

A. That I cannot say, positively. If he was, it was some time ago.

X Q. 28. Is there any other Tucker with the name of David in Milton?

A. I don't know of any other.

X Q. 29. Where does he live in Milton.

171 A. Part of the town called Scott's Woods.

X Q. 30. Has he been representative in the legislature?

A. I think he was for two years.

X Q. 31. For how long a time have you been hearing such talk at the gatherings at the blacksmith's shop which you have mentioned?

A. The shop has not been built for more than four or five years. I don't know if it has been built as long as that. I couldn't state how long.

X Q. 32. State as near as you can.

A. Ever since the shop was built.

X Q. 33. Who owns the shop?

A. I own the shop.

X Q. 34. Did you build it?

A. Yes, sir.

X Q. 35. When first, after it was built, did you hear any talk about said Sumner's character in it?

A. That I could not recollect. Very soon after.

X Q. 36. By whom?

A. I could not recollect the parties.

X Q. 37. Has that shop in fact been built for more than two or three years?

A. That I could not say. I think it may be three years, or somewhere about there.

X Q. 38. Did you ever hear said Sumner's general character for truth and veracity questioned until those gatherings in the blacksmith shop?

A. I think I have.

X Q. 39. Don't you know one way or the other?

A. I think there is no doubt about it. I think I have. I couldn't say. I am positive I have.

X Q. 40. Do you mean, by saying you are positive, anything more than that you think you have?

A. When I think a minute I am positive that I did.

X Q. 41. Why?

A. Why I am positive? I am positive because I am certain that I d.

X Q. 42. Why are you certain?

A. I am positive that I heard it. I am positive that I heard these things before that time.

172 X Q. 43. Question repeated.

A. I can't give any other reason, but I am positive that I heard it.

X Q. 44. State the names of the persons from whom you heard it prior to the gatherings in the blacksmith shop?

A. I think it was John Bradlee, and I think Charles Bradlee, who is a son of John Bradlee, and who is now dead. That is all I recollect of now.

X Q. 45. How long before the gatherings in the blacksmith shop was it?

A. I could not recollect exactly. I should think it might have been three or five years.

X Q. 46. Where was it?

A. I could not recollect the place.

X Q. 47. Between that time and the gatherings in the blacksmith shop did you hear it spoken of; and, if so, by whom?

A. I heard it spoken of a good many times, but I could not recollect by whom now.

X Q. 48. Were John and Charles Bradlee together on the occasion you refer to?

A. I think not.

X Q. 49. What did they tell you about it?

A. I could not state any particulars. It was the general talk at the time.

(The last part of the answer objected to as not responsive, and as indicating the animus of the witness.)

X Q. 50. Is that the only time John Bradlee ever told you anything about it?

A. I think not.

X Q. 51. When else, and where?

A. I couldn't state.

X Q. 52. Can you remember any other time?

A. No; not any one particular time.

X Q. 53. What did J. Walter Bradlee say to you about said Sumner's character, and when, and where?

A. That I couldn't state, any particular time. I couldn't rec-
173 ollect, to save my life, where, or when, or what he said at the times.

X Q. 54. Was it recently?

A. Nothing very recent.

X Q. 55. What did David Tucker say to you about said Sumner's character, and when and where?

A. I heard him say he was a liar. I couldn't state where. I think it might be in Boston, but I am not certain. I couldn't state when. I should think it might be two or three months ago.

X Q. 56. Don't you know that said Tucker and said Sumner have had a personal difficulty, or have you not so heard?

A. I have heard so.

X Q. 57. How long ago did you hear so?

A. I couldn't tell. I should think it might be two or three months, or more.

X Q. 58. What did said Abraham Holmes say, if he said anything, about the character of said Sumner, and when and where?

A. I couldn't recollect.

X Q. 59. Did not said Sumner commence a suit against you for his brother for your trespasses on his brother's land, and is not that suit now pending?

A. I don't know whether it is pending or not; he says it is "hung up." He commenced a suit for his brother.

X Q. 60. When did he commence it—how long ago?

A. That I can't remember now; but I should think it was near three years ago.

X Q. 61. Since then have you not yourself spoken badly of said Sumner to others?

A. I think I have not said anything bad of Mr. James Sumner.

X Q. 62. Are you sure?

A. I think I am sure.

X Q. 63. Will you swear that you have not spoken against him and against his character to others?

A. I cannot recollect of any time that I have spoken bad of Mr. James Sumner. I have spoken of the case several times, how it was managed.

174 X Q. 64. How did you speak of it as being managed?

A. I think I spoke of its being managed poorly.

Redirect:

Re-D. Q. 65. Did you come here on a subpœna, and were you paid $2.20 for coming?

A. Yes, sir.

JOHN MYERS.

Subscribed and sworn to this 27th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till 2.30 p. m. of this day.

BOSTON, *June* 27, 1873—2.30 p. m.

Present, counsel for both parties as before.

ALBERT G. BROWNE, Jr., a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says:

Q. 1. What is your name, age, residence, and occupation?

A. Albert G. Browne. I am 37 years of age; I reside at Cambridge; I am a lawyer by profession, and for the last six years have been the official reporter of the decisions of the supreme judicial court of the State of Massachusetts.

Q. 2. Will you please state whether or not, by reason of your office as reporter, it is your duty to attend the sittings of the supreme judicial court of Massachusetts, and to hear the arguments made to that court sitting in banc, and to report the same?

A. It is.

Q. 3. How extensive is your acquaintance with the members of the Massachusetts bar?

175 A. I am personally acquainted with almost all members of the profession who usually practice before the supreme judicial court sitting in banc.

Q. 4. Will you please look at Mr. James Sumner, now present, and please state if you know him?

(Objected to as immaterial.)

A. I have not the pleasure of his acquaintance.

And being cross-examined by Mr. Washburn, says:

X Q. 5. Mr. Browne, are you familiar with the dockets of the said supreme court?

A. I am familiar with the docket of the cases which for the last six years have been argued before the supreme judicial co in banc—not with the other dockets of that court.

X Q. 6. Are you acquainted with all the lawyers having cases in the supreme court, but which have not yet come for argument before the full bench?

A. Until cases come upon the docket for the full bench, I am not likely to have knowledge of them, unless they are in some way connected with my own professional practice.

X Q. 7. Do you know of the cases now pending in the supreme court, but which have not yet come to argument before the full bench, of Rufus W. Sumner against Myers; a bill in equity of Provident Institution for Savings; and Anderson Hollingsworth and others, a bill of interpleader; and of bill in equity in the matter of the will of John Nickerson of Provincetown, in all of which said James Sumner appears as attorney?

(Objected to on the ground that there is no evidence before the court that Mr. Sumner is of counsel in such causes.)

A. I do not.

X Q. 8. Do you know of any such cases in said supreme court?

A. I do not.

176 X Q. 9. You think that because you do not know said Sumner as practicing before the full bench of the supreme court, it is in any way to be inferred that he is not a lawyer in active practice?

A. No, sir.

Redirect:

X Q. 10. Have you received your witness-fees in this case?

A. I have.

ALBERT G. BROWNE, JR.

Subscribed and sworn to the 27th day of June, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till June 28th, 1873, at 10 a. m.

BOSTON, *June 28th*, 1873.

Present, counsel for both parties as before.

Counsel for complainant offers in evidence a certificate from the office of the secretary of state of Massachusetts, of the appointment of J. Walter Bradlee as a justice of the peace, marked "Complainant's Exhibit, Bradlee, No. 1, E. G. T., Exr."

Examination adjourned to new notice, except as to the further examination of the witness George F. Milliken, which is to be on notice to Mr. Thacher.

E. G. THOMPSON,
Examiner.

177 NEW YORK, *July* 7, 1873—11 a. m.

Present: Mr. Keller and Mr. Wetmore, of counsel for complainant; John S. Washburn, esq., of counsel for defendant.

LYMAN B. HANAFORD, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Keller, says:

Q. 1. What is your name, age, residence, and occupation?

And being cross-examined by Mr. Washburn:

X Q. 26. Is the J. W. Payson, with whom you have said you
181 carried on a mercantile academy in Boston, the same man who was connected with Seldom Dunton, brother of said A. R. Dunton?

A. The same.

X Q. 27. Said Seldom Dunton and said Payson had a long and acrimonious controversy with said A. R. Dunton, did they not?

A. I don't know whether the language is not too strong. There has been a dispute between them for some years in regard to copy-books.

X Q. 28. How long were you and said Payson partners, as testified?

A. From six to seven years, probably. I could not be accurate as to the date I left him.

X Q. 29. What time in the summer of 1853 was it that you assisted said A. R. Dunton book-keeping, &c., as you have stated?

A. I should judge, from the data which I have, that it was about September—August or September.

X Q. 30. What, if anything, did you teach there besides book-keeping?

A. Mathematics, and assisted some in teaching penmanship. Dunton had very little business any way, and did not need much help.

X Q. 31. Did you teach every day during the week; and, if so, during what hours?

A. As near as I remember, every day during the ordinary business hours.

X Q. 32. Did you teach in the same room with Dunton?

A. I did, part of the time. His room was divided by one or more partitions, six or seven feet high, and some of the time I might have been in one of the divisions and he in the other; but we were constantly within hearing of each other.

X Q. 33. When you were engaged in teaching in French's school, as you have testified, how many hours each day were you so employed there?

A. From six to eight hours during the warm weather, and from six to ten hours a day during the cold weather. His warm-weather season was from the 1st of May to the 1st of October. From the
182 1st October till the 1st of May he had an evening-school from 7 till 9, except Saturday evenings.

X Q. 34. While you were assisting said Dunton, did you teach separately and independently from him, or were you obliged to have his aid?

A. In everything except the penmanship, independently. Dunton knew very little of anything else except penmanship.

X Q. 35. What proportion of your services were devoted to teaching penmanship?

A. Probably not more than one-quarter part of the time.

X Q. 36. In what respect did you teach penmanship independently?

A. I did not consider myself thoroughly competent to teach penmanship. Mr. Dunton wrote most of the copies that were written at all, some of them having been engraved. I gave some directions and assistance to the pupils when he was out.

X Q. 37. Is that all the connection you had with teaching writing there?

A. That is about all.

X Q. 38. What did Dunton set the copies with?

A. With a pen and ink when he wrote; with nothing else that I know of.

X Q. 39. Was the writing you referred to when you stated that you had frequently seen him write?

A. This was a part of it. He frequently wrote, or struck large capitals, and made flourishes on large sheets of paper.

X Q. 40. What did he do those with?

A. Pen and ink.

X Q. 41. What did you ever see him draw?

A. I think a few designs on cards.

X Q. 42. What kind of designs *and* cards?

A. What are called scrolls, flowers, and birds; on visiting cards.

X Q. 43. You say you "think" you saw him draw a few of these; are you not sure you did?

A. I am not sure, but am very confident that I did.

X Q. 44. How many in all, do you think?

183 A. Perhaps from twelve to twenty.

X Q. 45. On how many occasions in all, do you think?

A. About as many different occasions. He never continued long at any one thing.

X Q. 46. What did he use to draw with?

A. Ordinary lead-pencils, as far as I remember; common lead-pencils, and silver styles, I suppose I should call them, on the enamel cards.

X Q. 47. Was there anything which you remember to call your attention particularly to the kinds and peculiarities of the pencils he so used in drawing; and, if so, what?

A. Nothing in particular.

X Q. 48. How did he shade or blend the marks and lines in the scrolls, flowers, and other designs which he drew?

A. By repeated strokes of the pencil or style, as far as I remember.

X Q. 49. Is that the only way you think you ever saw him do it?

A. It is the only way that I remember.

X Q. 50. At the time you were so assisting Dunton those few weeks, was he engaged in preparing or making his copy-books or charts for publication?

A. I do not think he was.

X Q. 51. Did you ever see a pencil having lead in one end of the wood, and rubber in the other end of the wood, or like the defendant's Exhibit E, anywhere?

A. I may, within the last year or two, have seen a pencil with lead in one end and rubber in the other, but am not positive. I have been at Mr. Payson's room while he was engaged in preparing copies, and have seen his implements and materials, and may have seen such a pencil there, but do not remember it.

X Q. 52. I do not ask what you may have seen. Have you any recollection of ever seeing such a pencil?

A. I have no definite recollection.

X Q. 53. Do you mean to be understood as testifying that Dunton could not have had and used such a pencil, or only that you do not now remember having seen him have it?

184 A. I do not think he had such a one.

X Q. 54. Question repeated.

(Objected to on the ground that the witness has already answered it.)

A. I think he could not have had such a one, because I was in a position to know something of it, and to see the pencil.

X Q. 55. If said Charles French, whom you afterwards assisted, should

tell you that he saw said Dunton have and use such a pencil at or about that time, what then would you think?

A. I should still doubt it, because Mr. French was very hostile towards J. W. Payson and myself on account of our carrying on an opposition school. I think Mr. Payson's connection with the copy-books called Payson, Dunton & Scribner's series, which were the rivals of another series prepared by A. R. Dunton, would lead Mr. French to wish to assist Mr. Dunton against Mr. Payson on account of the hostility above mentioned.

X Q. 56. How did the fact whether A. R. Dunton made and used such a pencil as described concern or affect the interests of you and said Payson?

A. Not at all that I am aware of.

X Q. 57. Were you and said Payson hostile to Mr. French?

A. No; but Mr. Payson and myself having been employed in French's school, left it, and established another similar to his, and Mr. French manifested in many ways a great deal of ill-will towards us.

X Q. 58. Did you interfere with his business or patrons in any way?

A. No, sir; but we attended to our own business, and our school appeared to have more students and to be more flourishing than his or any other in the city at that time.

X Q. 59. Did you not obtain pupils who had formerly been pupils in French's school?

A. I think some of the pupils left his school and came to ours.

X Q. 60. Your school and business competed also—did it not—with said A. R. Dunton's?

A. Not much.

X Q. 61. Did it some?

A. Mr. Dunton's business and school was so small that we did not regard it as competing with ours to any great extent.

X Q. 62. Question repeated.

(Objected to as already answered.)

A. Of course it did.

X Q. 63. There were legal proceedings—were there not—growing out of the controversy between said Seldom Dunton and said Payson and said A. R. Dunton?

A. I do not know.

X Q. 64. Have you ever practically used defendant's Exhibit E, or any pencil like it?

A. I think not. I never have seen defendant's Exhibit E.

X Q. 65. In stating then, for book-keeping purposes, you regard it as of no value whatever, and for the erasure of fine lines near together, of very little value, your answer is not based on any practical or actual test or experience of it—is it—but is only a mere matter of opinion?

A. No, sir; the opinion which I expressed above was based solely upon the examination of the pencil here to-day.

X Q. 66. And that examination consisted solely in taking and looking at it—did it not?

A. No, sir.

X Q. 67. What else?

A. I felt of the rubber point and observed that it lacked necessary firmness for erasing lines easily or readily; that's all.

X Q. 68. How do you know it does?

A. I judge so from the examination I gave it.

X Q. 69. It is, then, only matter of your opinion—is it?

A. It is a matter of opinion founded upon the said examination.

186 Redirect:

Re-D. Q. 70. Were writing or drawing implements used by Mr. Dunton, or any of them, in his rooms while you were in such rooms as a teacher; and, if so, what position in the rooms did they occupy?

(Objected to as re-opening the direct examination, and not called for by the cross.)

A. They were in the rooms, and were lying loosely upon the table and desks. He had very little order in his school-room.

Re-D. Q. 71. Were you ever a party to the controversy between A. R. Dunton and Seldom Dunton, or to that between A. R. Dunton and Payson, Dunton & Scribner?

A. I never was legally a party in said controversies, nor did I ever have any pecuniary interest in said controversy or in the copy-books.

L. B. HANAFORD.

Subscribed and sworn to this 7th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

RUDOLPH STUELER, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by Mr. Wetmore, says:

Q. 1. What is your name, age, residence, and occupation?

A. Rudolph Stueler. I am 42 years of age. I reside at 262 Henry street, New York. I am a naval architect, and partially employed by the Government in the revenue marine as naval architect.

Q. 2. Are you a practical draughtsman; and what experience have you had in mechanical drawings?

A. I am, since 1848. My experience is from 1848.

Q. 3. In the course of your experience as draughtsman, what experience have you had in the use of erasers?

(Objected to as immaterial and irrelevant.)

187 A. Using all kinds of India rubber. I find that the prepared or vulcanized rubber, in as solid a form as possible, is the only feasible one.

Q. 4. And have you been in the habit of using erasers in the course of your profession?

(Same objection, and objected to so far as it is an attempt to show want of utility.)

A. I have.

Q. 5. Please examine defendant's Exhibit E, now shown you, and make a practical trial of it, if necessary, and state your opinion as to its practical usefulness and value as an eraser; especially as an eraser of fine lines close together; and please give your reasons for such opinion.

(Same objections.)

A. The rubber not having sufficient stiffness and substantiability causes an uncertainty of action, and after being used for a little while is worn off and allows the wood of the pencil to scratch the paper. Where hard pencils, or Nos. 4 and 5, are used, I don't think the line could be entirely erased from the paper without scratching with the wood.

Q. 6. Is such opinion given after having actually tried the eraser?

A. Yes

Q. 7. What is your opinion as to the value or usefulness of the eraser?

A. In regard to mechanical drawings, little. In regard to erasing any written matter it may be used.

tell you that he saw said Dunton have and use such a pencil at or about that time, what then would you think?

A. I should still doubt it, because Mr. French was very hostile towards J. W. Payson and myself on account of our carrying on an opposition school. I think Mr. Payson's connection with the copy-books called Payson, Dunton & Scribner's series, which were the rivals of another series prepared by A. R. Dunton, would lead Mr. French to wish to assist Mr. Dunton against Mr. Payson on account of the hostility above mentioned.

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L. B. HANAFORD.

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E. G. THOMPSON,
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A. Yes

Q. 7. What is your opinion as to the value or usefulness of the eraser?

A. In regard to mechanical drawings, little. In regard to erasing any written matter it may be used.

And being cross-examined by Mr. Washburn, says:

Q. 8. The test of said exhibit which you made consisted, did it not, in ruling on a piece of paper two parallel lead-pencil lines, near together, and then attempting with the rubber end of said Exhibit E to erase a part of one of those lines?

A. It did erase one line, but a part of the next one to it, on account of the uncertain action of the rubber; but the pencil was a soft
188 one, as No. 4 or 5, was present. On former occasions I tried a sharp line of No. 4 pencil, and could not entirely erase it from the paper.

Q. 9. Please look at the paper now shown you, and state if that is not the test you made; and now answer if you did not erase that part of one of the lines which you attempted to erase?

A. That is the test I made. The line is erased, but not clean.

X Q. 10. Don't you believe that you could have erased it clean if you had tried it a little longer?

A. A second trial will show. Not perfectly clean, as required in mechanical drawings, as shown in a second trial, which I have now made.

X Q. 11. Does it not erase sufficiently clear for the erasure of lead marks other than in mechanical drawings?

A. Yes; if not too large a space is required to be erased.

X Q. 12. That exhibit is as good, is it not, as any pencil of the kind which would contain lead in one end in the wood, and as small a section of rubber in the other end in the wood?

A. It is not as good as pencils with larger pieces of stiff India rubber inserted, but I have never seen any pencils with as small a section of rubber as this inserted.

Redirect by Mr. Wetmore:

Re-D. Q. 13. Is this sheet of paper one upon which you made the test referred to in your examination, and are the partially-erased lines in the corner, which I will ask you to mark with your initials, the result of that test?

A. Yes.

Paper offered in evidence, and marked "Complainant's Exhibit, Stueler No. 1. E. G. T., Exr."

(Objected to by defendant's counsel on the ground that the said test was made hastily, and with evidently not such a degree of care
189 as a mechanical engineer would use in actual work, and because in making it he unnecessarily blurred and rubbed both lines into each other.)

R. STUELER.

Sworn and subscribed to before me this 7th day of July, 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned to July 8th, 1873, at 11 o'clock a. m.

NEW YORK, *July* 8, 1873—11 a. m.

Present: Mr. Keller and Mr. Wetmore, of counsel for complainant; and John S. Washburn, of counsel for defendant.

GEORGE W. WUNDRAM, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. George W. Wundram. I am 35 years of age. I reside at 481 Eighth avenue, New York City. I am a civil and mechanical engineer.

Q. 2. Are you a practical draughtsman; and what knowledge and experience have you in the art of mechanical drawing?

A. I am. I have made a good many hundreds of drawings. I know how to draw, and how it ought to be done.

Q. 3. In the course of your experience as a draughtsman, have you had occasion to employ erasers; and, if so, how long have you been practically familiar with the use of erasers?

A. I have, for the last sixteen years.

Q. 4. Please look at defendant's Exhibit E, now shown you,
190 and state your opinion as to its value and practical utility as an eraser; and, if necessary for that purpose, please make an actual trial of it.

(Objected to as an attempt to attack the utility of the very invention described or referred to in the bill of complaint herein; and also because the value and actual capability of practical use have been proved and demonstrated by complainant's own witnesses, already called and examined on behalf of complainant, after actual trial of said exhibit.

And defendant's counsel further objects to any actual use of said exhibit for the above reasons, and because it is proved to be an original pencil-eraser made eighteen or more years ago, and to have remained ever since in the same condition in which it now is; and any further such actual use of it, as it has received by the last witness, Stuhler, will tend to injure it; and, moreover, is not a fair test, for the reason that the rubber shows the marks of time, and the accummulation or effects of use and exposure, and of having been soiled, and the surface of its eraser is not in the original condition for such reasons, and any deficiency in its operation would not show, or tend to show, that such a pencil, made in precisely such a manner with new rubber, would not operate practically and perfectly as an eraser for all ordinary practical purposes. And further states, that whether or not the said exhibit can be practically used as an eraser is a matter which can be determined easily by the court itself by inspection, and refers the matter to the court for that purpose.

Counsel for complainant advises the witness that if after an inspection of the exhibit referred to in the question an actual trial of the exhibit cannot be made without injury to the exhibit, that that part of the question is waived.)

(The witness has made a trial of the exhibit.)

191 As to the utility as an eraser for mechanical drawings it is o little or no value. But for giving shades in penmanship sketches—a lighter shade—it might be used. For erasing large, long lines in mechanical drawings, and quick, as it ought to be, the wood of the pencil would touch and scratch the paper, as the rubber itself is too thin and too soft. When soft rubber is used, it wants to be in a large piece, or have a large surface.

And being cross-examined by Mr. Washburn, says:

X *A.* 5 When you say in your last answer as a reason why said Exhibit E would be of little value for erasing large, long lines in mechanica drawings quickly, because the wood of the pencil would touch and scratch the paper, do you mean the wood of this exhibit as it now appears, cut away at the eraser end?

A. As it is; or if the wood is cut away it would do the same, as the rubber is too thin and too soft, as anybody that understands something about drawing can see that the rubber would bend over.

X Q. 6. Were a stiffer piece of hard rubber of the same dimensions used, instead of the piece of rubber which is now in said exhibit, would it not then be free from the objections which you have mentioned?

A. It would be a little better, but far from free of objections.

X Q. 7. Do you mean that a piece of rubber of sufficient size to be a perfect eraser cannot be used in one end of a lead-pencil?

A. It can be used in one end of a lead-pencil if the piece of rubber is as near to the diameter of the wood as it can be made.

X Q. 8. Then the want of size of this piece of rubber in said exhibit, and the fact that it is soft, are your reasons for considering said exhibit of little value as an eraser in mechanical drawings, are they?

A. Yes.

X Q. 9. Have you ever seen or used a pencil having lead in one end and rubber in the other, or like Exhibit E, before?

A. I have one in my pocket now. There is lead in one end and rubber in the other.

192 X Q. 10. Does that differ substantially from Exhibit E, except in having a larger and harder piece of rubber?

A. The rubber in the pencil I have is round, and that in Exhibit E is square, and the rubber in mine is larger and harder.

X Q. 11. Is that all the substantial difference?

A. That is all the difference, except that mine can be used practically, and the other not.

X Q. 12. You mean for erasing in mechanical drawings, do you?

A. Yes, sir.

G. W. WUNDRAM.

Subscribed and sworn to this 8th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

TEILE H. MULLER, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. Teile H. Muller. I am 32 years of age. I reside at Yonkers, New York. I am an engineer.

Q. 2. Are you a practical manufacturer of pencils and pencil-erasers?

A. I am superintendent of the Eagle Pencil Company's works, and have charge of the same. I have been such superintendent since May, 1870.

Q. 3. Are you a practical draughtsman, and what education and experience have you had in that art?

A. I am; and was educated at the Polytechnical School in Hanover, Germany. I practiced free-hand drawing since my boyhood.

Q. 4. In the course of your experience, have you made and also used erasers; and, if yea, to what extent?

A. I have used erasers as long as I have been drawing. I have made a great many since 1870.

Q. 5. Please look at defendant's Exhibit E, now shown you, and
193 state your opinion as to its practical value and utility as an eraser, and, if necessary for that purpose, make an actual trial of said exhibit, provided you can do the same without injury to or alteration of the said exhibit.

(Same objections as to the 4th Q. to the witness Wundram.)

A. I should say that the practical utility of Exhibit E was confined in very narrow limits, as the eraser is so thin that it can only be used for erasing very light lines made with a soft pencil.

And being cross-examined by Mr. Washburn, says:

X Q. 6. Joseph Reckendorfer, the complainant in this suit, is the resident partner, and chief of the Eagle Pencil Company in this country, is he not?

A. To my best knowledge he is, but he is not here now.

X Q. 7. Is he temporarily absent, or permanently?

A. He has been in Europe since the spring of 1872.

X Q. 8. Question repeated.

A. That's all I know; he left at that time; I don't know when he will return, or whether he will return; I am entirely in the dark.

X Q. 9. The erasers, of which you say you have made a great many since 1870, were made, were they not, for said Eagle Pencil Co., and in the course of your said employment by complainant's company?

A. Some I made at the factory, and some I made at the house.

X Q. 10. Question repeated.

A. Some I made for myself, and some I made for the company.

X Q. 11. Were not those which you made for yourself samples or experiments, for the purpose of applying for letters patent?

A. Some of them were, some were not.

X Q. 12. How many letters patent have you applied for and obtained for pencil-erasers?

A. I would have to refer to the official record.

X Q. 13. State as nearly as you can.

194 A. I only recollect one at this time, for which a patent has been issued.

X Q. 14. Do you still own that; if not, to whom have you assigned it?

(Objected to as immaterial and irrelevant.)

A. I assigned it to the Eagle Pencil Co.

X Q. 15. Is that the patent which is described and referred to as granted to you in the bill of complaint in this action?

(Same objection.)

A. I do not know.

X Q. 16. Did you or do you know that a patent granted to you was included in this suit by complainant?

(Same objection.)

A. I may have been informed what patents were included in this suit, but am entirely unable to state at the present moment which they are.

X Q. 17. The pencil-erasers, for which you applied for letters patent, were improvements, were they not, or intended to be such, upon the pencil eraser described and shown in the letters-patent granted to Hyman L. Lipman, of Philadelphia, in 1858, were they not?

(Same objection, and likewise as calling for the contents of a written instrument.)

A. When I commenced my experiments I did not know anything about the Lipman patent, and only heard of the same after I had spent considerable time (say three or four months) on my experiments. My experiments resulted from the desire to have for my drawings a more convenient tool than a so-called rubber-tip pencil.

X Q. 18. But you did know, did you not, about, and was familiar with, the tapering pencil-eraser of the complainant, Reckendorfer, known as the "office-pencil," and patented by said Reckendorfer?

(Objected to as immaterial and irrelevant.)

195 A. Mr. Reckendorfer made me a present of an office-pencil a few days after I was introduced to him.

X Q. 19. And that was before you commenced making your pencil-erasers, was it not?

(Same objection.)

A. Yes, sir.

X Q. 20. You have stated that you assigned your said patent for an eraser to the Eagle Pencil Co. Did you not, in fact, assign it to Joseph Reckendorfer, the complainant in this case?

(Same objection.)

A. I assigned it to Mr. Reckendorfer, as I understood that Mr. Reckendorfer and the Eagle Pencil Co. were one and the same.

X Q. 21. The pencil-erasers which you made and obtained said patent for were similar, were they not, to said Exhibit E, only you enclosed the eraser in a separate wooden tube attached to and forming a continuation of the pencil?

(Same objection.)

A. I don't understand that question exactly.

X Q. 22. What don't you understand about it?

(Same objection.)

A. You say the pencil-erasers which you made and obtained said patent for had a wooden tube attached. Do you mean only the pencils which I made for that particular patent or all my experiments?

X Q. 23. I mean those for that particular patent, and as described in the X Q. 21, which now please answer.

(Same objection.)

A. I think only a part of them had the wooden tube attached, as I think that the patent for the round rubber was given on models
196 made in conformation with the Lipman patent, i. e., with the continuous wooden sheath. The pencils were similar to Exhibit E in the respect that they had rubber in one end and lead in the other end of the wood.

X Q. 24. You have stated, in answer to the 13th X Q., that you only recollect one patent for which you applied for and obtained a patent for pencil-erasers. Do you make the same answer now?

(Same objection.)

A. No, sir.

X Q. 25. Now, please state how many different applications you have made and obtained patents therefor.

(Same objection.)

A. For the full list I would still have to refer to the official records.

X Q. 26. State all you can recollect, and describe them.

(Same objection.)

A. I recollect one application, consisting of a paper sheath around the rubber which forms the eraser, but the paper is not glued to the rubber. This patent, I think, was not granted. If it was granted, it was put in interference. As stated before, it is necessary for me to go over the official records to remember the history of the different patents so as to describe each one separately, as I have not paid any attention to them lately.

X Q. 27. You obtained, did you not, a patent for a pencil-eraser, in which the rubber was attached by a wooden tube to the pencil in continuation of it?

(Same objection.)

A. I certainly made application for such a claim. Whether it is embodied in the round-rubber patent or not, or forms subject-matter of a separate patent, I am unable to state at this moment.

197 X Q. 28. Describe the pencil-eraser which you refer to as included in your round-rubber patent.

(Same objection.)

A. The pencil has inserted in one end a round piece of rubber-eraser.

X Q. 29. Is that similar to said Exhibit E, with the exception of the rubber being round instead of square?

(Same objection.)

A. It is similar to Exhibit E in this respect: that the wooden sheath of the pencil contains in one end the rubber, and in the other end the lead; but differs materially in this respect: that the rubber being round allows an equal thickness of wood all around, and being round presents the best form to obtain the greatest stiffness with the least material.

X Q. 30. Did you not obtain a patent for another pencil-eraser, in which you used for enclosing the rubber wood veneers?

(Same objection.)

A. I did obtain a patent for covering a piece of round or polygonal cross-sectioned rubber with veneer, instead of paper, as was done before.

X Q. 31. Did you not assign all these various inventions and patents to Joseph Reckendorfer, the complainant in this suit?

(Same objection.)

A. Most assuredly I did.

X Q. 32. Were you not an applicant, opposing and put in interference with Philip Hufeland and others, with reference to the question as to whom a patent should be issued for connecting the eraser to a lead-pencil by means of a paper tube?

(Same objection.)

A. In that interference my application was for a wood tube.

198 X Q. 33. Are you not now in interference in the Patent-Office with said Philip Hufeland, with reference to the paper-tube pencil-eraser?

(Same objection.)

A. I withdrew from that interference, for the reason that I do not deem paper a proper material to connect and support a rubber-eraser with a pencil.

X Q. 34. Were you not, at one time, a party to such interference, opposing said Hufeland?

(Same objection.)

A. I was.

X Q. 35. Have you ever made any concession of priority in favor of said Hufeland?

(Same objection.)

A. I have not.

X Q. 36. Did you ever see one of the said Lipman pencils?

(Same objection.)

A. I saw some of the original Lipman pencils made with square rubber.

X Q. 37. Were they not similar to said Exhibit E?

(Same objection.)

A. They were similar as to the relative position of the rubber and lead, but different in the relative size of the rubber and lead.

X Q. 38. Do you mean to say that the section of rubber in the said Lipman pencil was very much thicker than in Exhibit E?

(Same objection.)

A. I should judge, from my memory, that the cross-section of the rub-

ber in the Lipman pencil was at least eight or nine times as large as in Exhibit E.

199 X Q. 39. In the Lipman pencil is the lead-groove both deepened and widened, or either, for the reception of the rubber, and which?

(Same objection.)

A. As I have never opened a Lipman pencil, I had no means of ascertaining; but I recollect that the lead on the end showed an unusual bright appearance, and was very much larger in one direction than in the other.

X Q. 40. The rubber in Exhibit E is the size of the lead-groove, is it not?

(Same objection, and as to new matter not called out by the direct.)

A. Apparently it is.

X Q. 41. Is not the pencil of Exhibit E a small-sized pencil having a correspondingly small groove?

(Same objection.)

A. I find it about $\frac{1}{64}$th of an inch smaller than the pencils usually made in this country.

X Q. 42. Were not said Lipman pencils which you saw open to substantially the same objections as to practical value as erasers as you have stated to Exhibit E?

(Same objection.)

A. The rubber in the only one Lipman pencil which I ever had in my hand for the purpose of trying the qualities of the rubber and lead did not have a very good quality of rubber, (I judged that the rubber had deteriorated from age,) and therefore it did not prove as good an eraser as an eraser in pencils which I have made for myself afterwards, as near as possible after the pattern of the Lipman pencil, but with a superior quality of rubber, such as is sold at present in stores for erasing purposes.

X Q. 43. Question repeated.

(Same objection.)

200 A. If the quality of the rubber in the pencil at the time I tried said Lipman pencil would have been as good as the rubber sold in the stores for erasing purposes, the Lipman pencil would have been a good practical pencil and eraser.

(Answer objected to as being simply the supposition of the witness and not responsive.)

X Q. 44. Question repeated.

(Same objections.)

A. The only objection I had to the Lipman pencil was that the rubber was too soft and therefore wore away very fast. For this reason I made some pencils after the Lipman patent, but with a good quality of rubber, and it proved satisfactory.

X Q. 45. Is not the rubber in said Exhibit E deteriorated by age?

A. I cannot say that unless I am allowed to cut the pencil.

X Q. 46. From the examination and trial which you have made of said Exhibit E, do you think it is as good rubber as is sold in the stores now for erasers?

A. The small piece projecting out of the pencil appears to be a good erasing gum, such as is used at present time. But not being allowed to cut any more wood away, I am, of course, unable to state exact.

T. H. MULLER.

Subscribed and sworn to this 8th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

JOHN P. CHARLTON, a witness produced on the part of the complainant, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

201 A. John P. Charlton. I am 40 years of age. I reside at Philadelphia. I am a stationer.

Q. Were you associated in business with Mr. Hyman L. Lipman in the years 1858 and 1859, and subsequently?

(Objected to as not testimony in reply to which complainant is now limited, and as immaterial and irrelevant.)

A. I was in his employ at that time.

Q. 3. Do you remember the introduction by him of his patented pencil-erasers in those years?

(Same objections.)

A. I do.

Q. 4. Were those pencils introduced into the market in the Eastern States, and especially at Boston; and, if so, can you state the time of such introduction?

(Same objections.)

A. They were introduced in Boston in 1858 and '9, by Mr. Lipman himself, personally.

(Answer objected to as hearsay, and not the witness' own knowledge.)

And being cross-examined by Mr. Washburn, says:

X Q. 5. How do you know they were introduced in Boston in 1858 and '59 by Mr. Lipman himself, personally?

A. Mr. Lipman went there; forwarded the orders from such parties as he had sold them to, and the goods were checked by me and forwarded.

X Q. 6. Give the names of the parties, and the amounts forwarded to each.

A. In that case I would have to refer either to my former evidence or the books; but can mention two parties they were delivered to, as my memory serves me now, Brown, Taggert & Chase, and Thomas Groom & Co.

X Q. 7. Were not those all?

A. That I cannot say without referring to the books.

202 X Q. 8. To the best of your knowledge and belief, were not those all?

A. I can only refer to my previous answer, for I can't say anything further than that.

X Q. 9. How many did you send to each of those firms?

A. I can't state the exact quantity without referring to the order-book.

X Q. 10. Was it a large or small quantity?

A. Small quantity; being a new article, people purchased small quantities for the purpose of trying them.

X Q. 11. Were they not, in fact, sent simply as samples?

A. They were direct purchases; samples are generally sent without charge.

X Q. 12. Did you ever send any of them before or after to them?

A. Thomas Groom & Co. ordered them afterwards, in 1859, I think; I could not tell any further without reference to the books, but I know that Thomas Groom & Co. had them a second time.

X Q. 13. How many the second time did they have?

A. The exact quantity I cannot state; it might have been a gross or more.

X Q. 14. Have you now stated all that were sent to Boston in 1858 and '59, as far as you know?

A. As far as I can recollect.

Redirect:

Re-D. Q. 15. What was the former case, referred to by you in your cross-examination, in which you say you testified?

A. I refer to the evidence given in the extension case of the Lipman patent.

Recross-examination:

Re-X Q. 16. You were a witness in behalf of the extension of said Lipman patent, were you not?

A. I was.

Re-X Q. 17. Are you still connected in business with said Lipman, at Philadelphia?

203 A. I am not, and have not been for a number of years.

Re-X Q. 18. Is your place of business in the same store with Lipman?

A. I am in the same store with Mr. Lipman.

JOHN T. CHARLTON.

Subscribed and sworn to this 8th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned to July 14th, 1873, at 11 a. m.

NEW YORK, *July* 14, 1873—11 a. m.

Examination adjourned to July 15, 1873, at 11 a. m.

NEW YORK, *July* 15, 1873—11 a. m.

Present: Mr. Blake and Mr. Wetmore, of counsel for complainant, and Mr. Jno. S. Washburn, of counsel for defendant.

ISAAC HIRSCH, being recalled by complainant, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. You have already testified in this cause?

A. I have.

Q. 2. You knew Mr. Reckendorfer, the complainant, and how long have you known him?

A. I knew Mr. Reckendorfer since 1860.

Q. 3. Are you familiar with the enlarged head rubber-inserted pencils manufactured and sold by the Eagle Pencil Company, under Mr. Reckendorfer's patent?

A. Yes.

Q. 4. Do you remember any occasion when Mr. Reckendorfer
204 showed you a pencil of the kind referred to in the last question; and, if yea, will you please narrate the first occasion when you saw said pencil?

(Objected to as leading and as assuming facts not shown.)

A. Mr. Reckendorfer showed me a pencil like the pencil referred to at the end of the year 1861; he showed me at the time two styles of pencils—one as referred to in this question, and one which he called double-graded pencil, which had two different grades of lead in. No. 1, in one end of the pencil, and No. 4 at the other, or Nos. 2 and 3, or Nos. 4 and

2, or Nos. 3 and 1. He asked me which pencil I thought would sell the best.

(Objected to, on the ground that the answer which the witness is proceeding to give in detail, and with particularity, is not responsive to the question, but is volunteered by the witness.)

Q. 5. Please proceed and state where the interview referred to in your last answer took place, and all that occurred on that occasion, so far as you remember, in relation to the manufacture or exhibition of said enlarged head rubber-inserted pencil.

(Same objections.)

A. It took place at 97 William street, New York, at the office of Messrs. Berolzeimer, Illfelder & Co. I gave him my opinion which pencil I thought would sell the best, and we had an argument about it.

Q. 6. Did Mr. Reckendorfer say anything, and, if so, what, in reference to who made the pencil he showed you?

(Objected to as calling for hearsay, and as incompetent to prove the fact thus irregularly sought to be proved, and also as irrelevant.)

A. He showed me the drawings of a pencil, as the pencil was constructed inside, as he would not cut one open, as he had only a few which he had made.

205 Q. 7. How did the pencil or pencils, which he then showed you, compare in regard to similarity or dissimilarity with the pencil, complainant's Exhibit No. 10?

A. It is the same as that, but it was not stamped. I don't know if it was sharpened, and also I don't know if it was stained wood or plain cedar wood.

Q. 8. Will you please state how you fix the date of the occasion concerning which you have testified?

A. It was the year before Mr. Reckendorfer's going to Europe; it was the time near the holidays.

Q. 9. When did Mr. Reckendorfer go to Europe?

A. August, 1862.

Q. 10. Was any one else present at the conversation you have related, and, if so, who?

A. Mr. Bernhard Illfelder and Mr. M. Scheftel.

Q. 11. Where is Mr. Reckendorfer now?

A. Mr. Reckendorfer is in Europe now, and is there since last year.

Q. 12. Is Mr. M. Scheftel dead?

A. Yes; he died in 1868 or '69.

Q. 13. Do you know Mr. Faber, who is the defendant and a witness in this case?

A. I do.

Q. 14. Was he the remonstrant who opposed the extension case?

(Objected to as incompetent, immaterial, and irrelevant.)

A. He was the remonstrant in the extension of the Lipman patent.

Q. 15. How long have you been in the employ of the Eagle Pencil Co.?

A. I am with the Eagle Pencil Co. since 1871.

Q. 16. What is the business of that company?

A. Manufacturing, importing, and selling pencils.

Q. 17. Have they sold the rubber-inserted pencils of Lipman & Reckendorfer?

A. They have made and sold them.

206 Q. 18. Have you calculated, from the books of the Eagle Pencil Co., the amount of their sales of such rubber-inserted pencils since and including the year 1863?

(Objected to as irrelevant and immaterial, and as attempting to prove the contents of books by incompetent testimony.)

A. I have made out a statement from that time till now out of the books, and the books are here to compare with the made-out statement.

Q. 19. Please produce this statement.

(Same objection.)

A. I herewith produce the statement.

(Statement offered in evidence by counsel for complainant, and marked "Compl't's Exhibit Hirsch, No. 1, E. G. T., Exr."

Same objection as to statement offered in evidence.)

Q. 20. Will you produce samples of the pencils referred to in this statement?

(Same objection.)

A. I herewith produce four of them, and their name in the trade is called as appears in the statement referred to above.

(The pencils referred to are offered in evidence and marked as follows: Exhibit Hirsch, No. 2, is the "Black Gilt Rubber-head" pencil; Exhibit Hirsch No. 3, is an "Office Round Rubber-head" pencil; Exhibit Hirsch No. 4, is an "Office Octagon Rubber-head" pencil; Exhibit Hirsch No. 5, is a "Hexagon Gilt Rubber-head" pencil.)

Q. 21. Which of the lines in your statement, Exhibit Hirsch, No. 1, shows the number of gross of pencils sold by your company?

207 A. The line where the word "total" is in front.

(There are produced the following 11 books of the Eagle Pencil Co., which are marked on their backs as follows: "Sales B, Sales C, Sales D, Sales E, Sales F, Sales G, Sales H, Gold Sales B, Day-Book from October 1st, 1868, to April 30, 1870, Gold Sales D, and Gold Sales E.")

Q. 22. Are these books necessary to your business, so that you cannot part with custody of them?

A. They are.

Q. 23. Are you ready and willing here and now to exhibit to counsel on the other side the contents of these books, so far as they bear on the statement you have produced; and, if desired, to exhibit them to the examiner, and read them to him?

A. I am; and, to facilitate the matter, I have checked most every sale in these eleven books, and got a memorandum of most of the folios, so that the work can be done in a very short time.

And, being cross-examined by Mr. Washburn, says:

X Q. 24. You are the agent of the complainant, are you not, and verified the bill of complaint, and have had charge, as his agent, of the management of his case, and the preparation of his proofs herein?

A. I am the agent of the complainant. I verified the bill of complaint. The management of this case our counsel has, and not myself. I do not understand what you mean by the preparation of the proofs.

X Q. 25. Was Mr. Reckendorfer in this country when this suit was commenced?

(Objected to as immaterial, and new matter.)

A. I have stated before he was not.

X Q. 26. Did you not employ, as his agent, his lawyers in this suit?

A. They were his lawyers before this suit was commenced; and when I commenced it, of course I had to take his lawyers. I commenced it on his request.

208 X Q. 27. Were Keller & Blake his lawyers before this suit was commenced; and, if so, in what matter?

A. They were his lawyers before this suit was commenced, in consultation of patent matters.

X Q. 28. Was not such consultation with reference to the commencement of this suit and the patents named in it?

A. There was one, I remember, about this suit, but the others I can't say, as I wasn't present.

X Q. 29. Who retained Keller & Blake for this suit, in fact?

A. I don't know.

X Q. 30. Did you not yourself engage complainant's lawyers for this suit, or any of them?

A. I said before that they were his lawyers before this suit was commenced, and when I commenced this suit at his request, I went to his lawyers.

X Q. 31. Have you not been engaged, during the taking of complainant's proofs, in procuring witnesses to testify on his side?

A. A few.

X Q. 32. Have you not attended the greatest part of the time on the taking of the proofs thus far on both sides in the case?

A. I have attended in New York most of the time—once in Philadelphia, and twice in Boston; but most of the testimony taken in the East I have not attended.

X Q. 33. Have you not constantly, during the taking of proofs in this suit, made suggestions and given aid to the extent of your ability to complainant's lawyers?

A. Not constantly, but very often.

X Q. 34. What was your business prior to your employment by the Eagle Pencil Company?

A. Before I was with the Eagle Pencil Company, I was an importer of fancy goods, of the firm of Frank & Hirsch, No. 91 Chambers and 73 Reade street.

X Q. 35. When did your connection with that business commence and cease?

A. We started this firm in 1865, and dissolved it at the commencement of 1871.

X Q. 36. What was your business before that firm; when did it commence, and when and how terminate?

209 A. Metz & Co., manufacturers of pocket-books and leather goods; it commenced in 1862, and the firm of Frank & Hirsch bought out this firm in 1865, and continued the business.

X Q. 37. What was your business prior to Metz & Co.; when did it commence, and how terminate?

A. Isaac Hirsch & Co., stationers; from 1858 till the war broke out in 1861; it terminated that we had to suspend payment, but settled afterwards and paid, particularly your client, Mr. Faber, one hundred cents on the dollar, and, if I am not mistaken, with interest.

X Q. 38. When did the Eagle Pencil Co. commence the manufacture of pencils in this country?

A. That is impossible for me to state, exactly the time.

X Q. 39. Was it not subsequent to 1864?

A. I don't know.

X Q. 40. Why don't you know?

A. Because I was not with that company at that time. I know that the Eagle Pencil Co. commenced to manufacture in the years of '60—some time between 1860 and 1870; but to know the time I would have to refer to the books.

(Objected to as irrelevant and immaterial, and as attempting to prove the contents of books by incompetent testimony.)

A. I have made out a statement from that time till now out of the books, and the books are here to compare with the made-out statement.

Q. 19. Please produce this statement.

(Same objection.)

A. I herewith produce the statement.

(Statement offered in evidence by counsel for complainant, and marked "Compl't's Exhibit Hirsch, No. 1, E. G. T., Exr."

Same objection as to statement offered in evidence.)

Q. 20. Will you produce samples of the pencils referred to in this statement?

(Same objection.)

A. I herewith produce four of them, and their name in the trade is called as appears in the statement referred to above.

(The pencils referred to are offered in evidence and marked as follows: Exhibit Hirsch, No. 2, is the "Black Gilt Rubber-head" pencil; Exhibit Hirsch No. 3, is an "Office Round Rubber-head" pencil; Exhibit Hirsch No. 4, is an "Office Octagon Rubber-head" pencil; Exhibit Hirsch No. 5, is a "Hexagon Gilt Rubber-head" pencil.)

Q. 21. Which of the lines in your statement, Exhibit Hirsch, No. 1, shows the number of gross of pencils sold by your company?

207 A. The line where the word "total" is in front.

(There are produced the following 11 books of the Eagle Pencil Co., which are marked on their backs as follows: "Sales B, Sales C, Sales D, Sales E, Sales F, Sales G, Sales H, Gold Sales B, Day-Book from October 1st, 1868, to April 30, 1870, Gold Sales D, and Gold Sales E.")

Q. 22. Are these books necessary to your business, so that you cannot part with custody of them?

A. They are.

Q. 23. Are you ready and willing here and now to exhibit to counsel on the other side the contents of these books, so far as they bear on the statement you have produced; and, if desired, to exhibit them to the examiner, and read them to him?

A. I am; and, to facilitate the matter, I have checked most every sale in these eleven books, and got a memorandum of most of the folios, so that the work can be done in a very short time.

And, being cross-examined by Mr. Washburn, says:

X Q. 24. You are the agent of the complainant, are you not, and verified the bill of complaint, and have had charge, as his agent, of the management of his case, and the preparation of his proofs herein?

A. I am the agent of the complainant. I verified the bill of complaint. The management of this case our counsel has, and not myself. I do not understand what you mean by the preparation of the proofs.

X Q. 25. Was Mr. Reckendorfer in this country when this suit was commenced?

(Objected to as immaterial, and new matter.)

A. I have stated before he was not.

X Q. 26. Did you not employ, as his agent, his lawyers in this suit?

A. They were his lawyers before this suit was commenced; and when I commenced it, of course I had to take his lawyers. I commenced it on his request.

208 X Q. 27. Were Keller & Blake his lawyers before this suit was commenced; and, if so, in what matter?

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A. A few.

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A. I have attended in New York most of the time—once in Philadelphia, and twice in Boston; but most of the testimony taken in the East I have not attended.

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A. Isaac Hirsch & Co., stationers; from 1858 till the war broke out in 1861; it terminated that we had to suspend payment, but settled afterwards and paid, particularly your client, Mr. Faber, one hundred cents on the dollar, and, if I am not mistaken, with interest.

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A. That is impossible for me to state, exactly the time.

X Q. 39. Was it not subsequent to 1864?

A. I don't know.

X Q. 40. Why don't you know?

A. Because I was not with that company at that time. I know that the Eagle Pencil Co. commenced to manufacture in the years of '60—some time between 1860 and 1870; but to know the time I would have to refer to the books.

X Q. 41. Please refer to the books and answer when the Eagle Pencil Co. commenced to manufacture pencils in this country.

A. The books here are sales-books only, and I see some goods charged in 1867, but I can refer at home to find out the date.

The further cross-examination of this witness adjourned till July 16, 1873, at 10.30 a. m.

NEW YORK, *July* 16, 1873—11 a. m.

Present: Counsel as before.

And the cross-examination of Mr. Hirsch being continued by Mr. Washburn, he says:

210 X Q. 42. Are you now able to state when the Eagle Pencil Co. commenced to manufacture in this country? If so, please state.

A. I looked at the books, and find that in October, 1867, machinery and fixtures were bought for manufacturing.

X Q. 43. Question repeated.

A. I can't answer any other way.

X Q. 44. You don't know, then, how long after the machinery and fixtures were bought, the actual manufacture commenced?

A. I stated yesterday, I think, that I see some goods charged end of 1867. I said yesterday 1867; it should be end of 1867.

X Q. 45. Prior to that, then, were all the articles sold by the Eagle Pencil Co. imported?

A. I cannot answer this question, as I was not at that time with the Eagle Pencil Co., and have not posted myself in that respect; and, as Mr. Reckendorfer is not in this country at present, and is not since the last 14 months, I cannot answer this question positively.

X Q. 46. The sales-books of the company in your charge will show, will they not?

A. They will not positively, as at that time they were no established brands for the domestic goods, and I cannot distinguish what was made here and what was imported, to a certainty, to swear to it.

X Q. 47. Are there no books or invoices of the company which will enable you to answer certainly?

A. There are, and I answer that I see goods sold end 1867; but in your X Q. 45 you ask, were all the articles sold by the company imported, and the company may have sold some goods made here.

X Q. 48. Such were made, then, by other parties than the company, were they?

A. If they sold any before they had a factory, and they were of domestic manufacture, they must have been made by other parties.

X Q. 49. Were not all the pencils which the company sold prior to the end of 1867 imported?

A. I cannot say positively, as they may have sold some which were made here.

211 X Q. 50. Were not all the pencil erasers like complainant's Exhibits, Hirsch Nos. 2 to 5, inclusive, which were sold by that company prior to the end of 1867, imported?

A. They were.

X Q. 51. How many pencils like complainant's Exhibit No. 10 did Mr. Reckendorfer show you on the occasion to which you have referred?

A. Two or three.

X Q. 52. At the time had you any business connection with Berolzeimer, Illfelder & Co.?

A. I had not.

X Q. 53. How happened you to be at their office on that occasion?

A. Mr. Reckendorfer and myself were particular friends, and I visited him in his office as well as at his private house very often.

X Q. 54. That was then the office of complainant's firm?

A. It was.

X Q. 55. Do you mean to say that on that occasion you went in there merely for a friendly visit to Mr. Reckendorfer, and without any special object to take you there?

A. It may have been a friendly visit. It may be that Mr. Reckendorfer asked me to come there to look at those samples, and give him my opinion.

X Q. 56. Please state your recollection, and not your supposition of what might be.

A. I cannot state any more positive.

X Q. 57. How long was that interview?

A. About an hour or so.

X Q. 58. Can you state anything else that occurred or was said at it?

A. We had arguments which of the two kinds I referred to in the commencement of my testimony would sell the best, and I particularly remember that I made a mistake in arguing that the double-graded pencil would sell better than the inserted conical rubber head; and Mr. Reckendorfer, and, I think, Mr. Illfelder, were of different opinions, which shortly showed that they were right.

212 X Q. 59. Did the double-graded pencil you have mentioned have any eraser connected with it?

A. No.

X Q. 60. What comparison, as matter of sale, could there then be between them?

A. They were both new articles of manufacture, and, therefore, open to argument for sales.

X Q. 61. Neither could compete with or take the place of the other, could they?

A. Partly.

X Q. 62. Could the double-graded pencil be used for the same purposes as the pencil-eraser, except as a mere lead-pencil?

A. No; therefore I say partly.

X Q. 63. By "partly," therefore, you mean that each one had lead in it, and that is all?

A. That is all, only that the double-graded had leads of two different grades. With grades, I mean hardness and softness.

X Q. 64. Was any other subject or matter spoken of, or did anything besides occur at this interview of about an hour?

A. Different subjects of business, as business was at that time very dull.

X Q. 65. Subjects of business between you and Reckendorfer, or in which you were interested?

A. Nothing particular; but I told him I would go to Washington right after New Year's, and I would see if I could sell, myself, any pencils there.

X Q. 66. State all such other matters or things which were said or occurred at that interview.

A. I cannot state any more positively.

X Q. 67. The only other thing, then, that you recollect is that you told him you would go to Washington right after New Year's, and see if you could sell any pencils there?

A. That is all that I remember.

X Q. 68. What pencils were those?

A. All kinds that he had for sale at that time.

X Q. 69. Had he employed you before for a similar purpose?

213 A. No, sir.

X Q. 70. Did you volunteer that offer, or did he propose it?

A. I did; as I went to Washington with a collection of samples of other goods.

X Q. 71. Did you intend to make that offer before you went to see him on that occasion?

A. It may be, but I cannot swear to it.

X Q. 72. Was that the purpose for which you went to see him on that occasion?

A. No.

X Q. 73. What was the purpose?

A. I don't know. It may be that he asked me to come there, as I stated before that he asked me to see those samples.

(The witness' repeated suppositions, after he had been cautioned that they are not proper testimony, and that he must confine himself to direct answers from his own knowledge or his best recollection, are objected to as improper, and as indicating the character and animus of his testimony.

Mr. Blake informs the witness that his answers are perfectly proper, and tells him to take no notice of Mr. Washburn's objections.)

X Q. 74. State what your recollection is as to the purpose.

A. I cannot recollect any more positively for the purpose I went there, as I stated before.

X Q. 75. Do you recollect that he asked you to come there to see those samples?

A. I cannot say that positively, as I stated before; but it might have been.

X Q. 76. Question repeated.

A. I cannot give any other answer.

X Q. 77. You can state whether you do or don't recollect?

(The magistrate is requested to instruct the witness to answer definitely.)

214 A. I cannot, as I am under oath here, and will not state anything I do not know positively.

X Q. 78. Why do you not know positively about that?

A. Because I went to see Mr. Reckendorfer very often; sometimes he asked me the evening before to come to see him next day, and sometimes I went there myself without being asked.

X Q. 79. And, therefore, you suppose that he might have asked you to come on this occasion?

A. Yes.

X Q. 80. Have you any recollection, one way or the other, about it?

A. I don't recollect that he did or did not.

X Q. 81. Did you take said pencils, like complainant's exhibit No. 10, into your hands and carefully examine them?

A. I did; and I was anxious to know how they were constructed on the inside, and as Mr. Reckendorfer could not split any open, as he had only a few samples, he showed me the drawing, so that I could see the construction inside, as I wanted to know how far the rubber went down.

X Q. 82. Do you mean to say that you remember clearly the looks and appearance, construction and peculiarities, of those pencils in all respects?

A. I have stated before what the difference was, to the best of my

recollection, between the samples shown me at that time and Exhibit No. 10, shown me yesterday.

X Q. 83. Question repeated.

A. I do, with the exception I have stated yesterday in connection with Exhibit No. 10. It was the same. They were not stamped. They were not sharpened, and I don't know if they were plain cedar wood or stained wood.

X Q. 84. Do you mean that you cannot recollect what color they were?

A. I do recollect what color they were; they were black, but I don't know if the wood was stained in itself or not stained—what is called plain cedar wood.

X Q. 85. Is plain cedar wood black in color?

A. Plain cedar wood is red, but you can put a coat of color
215 over plain cedar wood, and the wood will be red all the time. Stained wood is cedar wood also, but stained before the pencil is made, and the outside color put on afterwards, as shown in Exhibits Hirsch Nos. 2 to 5, but the Exhibit No. 10, shown to me, is not stained wood, if I remember right.

X Q. 86. By "plain cedar-wood" pencils are not pencils known in the trade as such as have no color whatever put on, but remain a natural reddish color of the plain cedar?

A. They are; but I am not so familiar with the language to state what I mean in any other way; but I have explained now exactly what I mean in referring to Exhibits Hirsch Nos. 2 to 5. I mean by language, the English language.

X Q. 87. Are you not familiar with the English language, as used in business?

A. I am; but in technical expressions I may make mistakes.

X Q. 88. How long have you been in business in this country?

A. Since 1858.

X Q. 89. Has not your business, for a large part of that time, involved dealings in pencils and an acquaintance with the pencil business?

A. Certainly it has.

X Q. 90. Are you not familiar with the technical terms used in that business?

A. I am, but never was asked to explain the difference between cedar wood and stained cedar wood, as everybody will understand this question as I explained it.

X Q. 91. Have you not always known that by "plain cedar wood" pencils were intended pencils with no other color whatever than the natural reddish color of the cedar?

A. I have not. I know it only since about two years, when I went with the Eagle Pencil Co. As before, in my time, being in the stationery business, they were not sold very largely in this country, as there was no factory, to my recollection, here.

X Q. 92. You mean now, do you, to state that you absolutely
216 remember that the said pencils, which you say Reckendorfer showed you on that occasion, were colored black?

A. I mean now, and said before, that they were black; but I don't know if the cedar wood was stained or not stained.

X Q. 93. They certainly were not "plain cedar-wood" pencils, were they?

A. The wood in itself was plain or stained, but the outside was black.

(Mr. Joseph Illfelder suggests to the witness that he had better say 'black polished.")

X Q. 94. How do you know that Mr. Reckendorfer went to Europe in 1862?

A. I know that I saw him off on a steamer, and that at that time it was very troublesome to go abroad without having permission or passport of the United States, as no one could leave without it, as we were in time of war; and I know that nobody could go without having permission or passport.

X Q. 95. How long before Reckendorfer went was it that he showed you said pencils, on the occasion you have testified to?

A. About eight months.

X Q. 96. Do you know where those pencils were made which he showed you?

A. I don't; but I suppose in Europe.

(The last part of the answer objected to as heretofore.)

X Q. 97. Were you informed that they were made in Europe?

A. I don't remember.

X Q. 98. Are you not a relative , or connected by marriage with, said Reckendorfer?

A. Neither one nor the other.

X Q. 99. In your answer to the 17th question you state that the Eagle Pencil Company has made and sold pencils to Lipman & Reckendorfer. Do you mean other pencils than those like your samples,
217 Exhibits Hirsch Nos. 2 to 5, inclusive?

A. I meant of Reckendorfer and Lipman patent, which is combined in the Exhibits Hirsch Nos. 2 to 5, but they have made since, about a year ago, pencils where the Rockendorfer patent is not included, and which have not been included in the statement of sales from 1863 to 1872. Of this kind I produce two samples.

(Samples marked "Complainant's Exhibit Hirsch No. 6, E. G. T., Exr.")

X Q. 100. And these pencils, of which you now produce samples, are the kind which the Eagle Pencil Co. are now engaged in making and selling, are they?

A. They are.

Redirect:

Re-D. Q. 101. At what establishment, if you know, were the pencils or pencil-erasers manufactured which were imported by the Eagle Pencil Co. prior to 1867, when you say that company began to manufacture for itself in this country?

(Objected to because the witness has stated his ignorance and want of knowledge on the subject.)

A. They were manufactured in their factory in Fürth, Bavaria, where they are still manufactured, and imported to this country, as I stated in the commencement of my testimony.

Re D. Q. 102. Since your examination yesterday have you found any memoranda or papers which enable you to confirm your statement as to the date when Mr. Reckendorfer showed you the conical pencil referred to in your previous examination? and, if so, please produce such memoranda or papers, and please state how they confirm the said date.

(Objected to as re-opening the examination-in-chief, and as leading.)

218 A. I stated that I told Mr. Reckendorfer I would go to Washington a few days after New Year's. I looked at my papers and found a few letters addressed to me at Washington. Also, a hotel-bill

which I paid there at that time. The letters are written in the German language.

(The hotel-bill offered in evidence, marked "Complainant's Exhibit Hirsch No. 7, E. G. T., Exr.")

The letters produced are dated January 10th, 1862, January 13th, 15th, 18th, and 21st, 1862.)

And being further cross-examined, says:

X Q. 103. What day in August, 1862, did Mr. Reckendorfer go to Europe?

A. Between the 10th and 20th.

ISAAC HIRSCH.

Subscribed and sworn to this 16th day of July, 1873.

E. G. THOMPSON,
Examiner.

BERNARD ILLFELDER, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. Bernard Illfelder; I am thirty-one years of age; I reside at 127 East 56th street, New York City; I am an importer of stationery.

Q. 2. In the year 1861 were you in the employ of Mr. Reckendorfer; and, if yea, in what capacity?

A. I was; as book-keeper.

Q. 3. Do you remember any occasion when Mr. Hirsch visited Mr. Reckendorfer, when a conversation took place in regard to pencils; and if yea, when was it?

219 A. I remember that some time in December, 1861, Mr. Hirsch was at the office of Mr. Reckendorfer, and there was a conversation about pencils at that time.

Q. 4. Were any pencils exhibited on that occasion; and, if yea, by whom, and what sort of pencils were they, if you remember?

A. There were some pencils exhibited by Mr. Reckendorfer, one kind of which was of a conical shape, and had a piece of rubber inserted in the end of it, and the other kind had two grades of lead in it, so-called double-graded pencil.

Q. 5. Do you remember what the conversation was, and how long it lasted? and if you do, state all you remember.

A. Mr. Reckendorfer showed the pencils before mentioned to Mr. Hirsch, asking him his opinion which of the two kinds would be the most saleable, to which Mr. Hirsch replied that he thought the double-graded pencil would prove the more saleable one of the two. I expressed a different opinion, and Mr. Reckendorfer expressed himself to the same effect. There was also a third party present, by the name of Moritz Scheftel, now deceased. The conversation on this subject lasted about an hour, to the best of my recollection.

Q. 6. How long have you known Mr. Hirsch?

A. Since 1860.

Q. 7. How long were you in Mr. Reckendorfer's employ?

A. From 1860 to 1865.

Q. 8. During that period of time, how frequently did Mr. Hirsch come to Mr. Reckenkorfer's office?

A. Very often; I may state nearly every day, as they very frequently went to dinner together.

Q. 9. Do you remember Mr. Hirsch's going to Washington shortly after the conversation you have described?

A. I do; he went there in January, 1862.

Q. 10. Did he, on that visit, undertake any business for Mr. Reckendorfer; and, if so, what was it?

A. He proposed to take samples of lead-pencils along, but I do not remember whether he did so or not.

220 And being cross-examined by Mr. Washburn, says:

X Q. 11. You have been present and heard all the testimony of the preceding witness, Isaac Hirsch, have you not?

A. I have.

X Q. 12. What relation, if any, are you to Joseph Illfelder, now present, and in the employ of the Eagle Pencil Company?

A. I am his brother.

X Q. 13. What relation, if any, are you to Illfelder, of Berolzeimer, Illfelder & Co., who are the Eagle Pencil Co., of which firm the complainant is a member?

A. I am his son.

X Q. 14. How do you fix the time when said pencils were shown you, as you testified, as December, 1861?

A. Because it happened in the year previous to Mr. Reckendorfer's departure for Europe, which was in 1862.

X Q. 15. How do you know it was in the year before?

A. Because I remember that it was near Christmas-time in 1861.

X Q. 16. Why do you so remember?

A. Because the fall trade at that time was entirely over, and we had leisure time to talk over those matters.

X Q. 17. Is that your only reason?

A. I remember distinctly that it was in the year previous to Mr. Reckendorfer's going to Europe.

X Q. 18. What connection was there between his going to Europe and the time you saw these pencils, by which you are, or profess to be, able to fix the exact time?

A. Because Mr. Reckendorfer intended to leave already in the early part of 1862, in order to talk with his partners on the other side in reference to the manufacture of certain pencils, among which those two kinds—the rubber-inserted and double-graded—were included.

X Q. 19. Those pencils which you say he showed you were made in Europe, were they not?

A. They were, as far as I can recollect.

X Q. 20. And sent over from there prior to the occasion you say Reckendorfer showed them to you?

A. Certainly.

221 X Q. 21. Had not his partners already seen them in Europe?

A. They must have seen them when they manufactured them, but I cannot say whether they have seen them outside of their own manufacture.

X Q. 22. Did his partners send them over?

A. They came with some other goods from his partners in Europe.

X Q. 23. Do you know when they came?

A. In 1861.

X Q. 24. Can you state what invoice?

A. I cannot.

X Q. 25. Can you state when the invoice was received in which they were contained?

A. I cannot, except by supposition.

X Q. 26. Do you remember its coming at any time?

A. I don't remember that they were ever mentioned on any invoice, but merely remember their being sent over from Europe.

X Q. 27. Could they come without being mentioned in an invoice?

A. Yes; by being sent by express as samples.

X Q. 28. Do you know how these were sent?

A. I do not.

X Q. 29. When did Mr. Reckendorfer intend to leave?

A. In the spring of 1862.

X Q. 30. What time in the spring?

A. About March.

X Q. 31. How do you know that he intended to consult about their manufacture?

A. Because he told me so.

X Q. 32. Did he tell you at the time he sailed, or at the time he originally intended to sail in March?

A. He told me so in the latter part of 1861.

X Q. 33. That, on the same occasion that he showed them to you?

A. No.

X Q. 34. Was it before or after?

A. It was before.

X Q. 35. How long before?

222 A. Shortly after they arrived from Europe, which was a short time—about a week—before this conversation took place.

X Q. 36. Now, can't you tell by what means they came from Europe?

A. I do not distinctly remember.

X Q. 37. Do you remember at all?

A. I remember that they came, but not the means how.

X Q. 38. How long was Reckendorfer gone to Europe?

A. From the middle of August, 1862, till the fore part of November, in the same year.

X Q. 39. Did he take these said pencils which he showed you, as you have testified, to Europe with him?

A. I do not remember whether he did or not.

X Q. 40. Did he tell you that he was going to do so; or did you understand that he did do so?

A. I don't recollect neither one nor the other.

X Q. 41. Did you see them again after he came back from Europe?

A. I have seen rubber-inserted and double-graded pencils afterwards, but whether they were the same pencils as shown me at the conversation referred to I do not know.

X Q. 42. On his return, in November, 1862, did he tell you the result of his consultation with his partners in Europe about them?

A. He told me that he had made arrangements for their being manufactured at their place at Fürth, Bavaria.

X Q. 43. Were any subsequently received so manufactured; and, if so, when were the first?

A. I cannot state positively the date, but the stock of those pencils either came in the latter part of 1862 or the beginning of 1863.

X Q. 44. And was that the first time, after the occasion to which you have testified, when you saw such pencils again?

A. It was.

X Q. 45. Did not Mr. Hirsch undertake or do any business for Mr. Reckendorfer in Washington at any other time in 1862 than in January?

A. I do not remember of any.

A. I do; he went there in January, 1862.

Q. 10. Did he, on that visit, undertake any business for Mr. Reckendorfer; and, if so, what was it?

A. He proposed to take samples of lead-pencils along, but I do not remember whether he did so or not.

220 And being cross-examined by Mr. Washburn, says:

X Q. 11. You have been present and heard all the testimony of the preceding witness, Isaac Hirsch, have you not?

A. I have.

X Q. 12. What relation, if any, are you to Joseph Illfelder, now present, and in the employ of the Eagle Pencil Company?

A. I am his brother.

X Q. 13. What relation, if any, are you to Illfelder, of Berolzeimer, Illfelder & Co., who are the Eagle Pencil Co., of which firm the complainant is a member?

A. I am his son.

X Q. 14. How do you fix the time when said pencils were shown you, as you testified, as December, 1861?

A. Because it happened in the year previous to Mr. Reckendorfer's departure for Europe, which was in 1862.

X Q. 15. How do you know it was in the year before?

A. Because I remember that it was near Christmas-time in 1861.

X Q. 16. Why do you so remember?

A. Because the fall trade at that time was entirely over, and we had leisure time to talk over those matters.

X Q. 17. Is that your only reason?

A. I remember distinctly that it was in the year previous to Mr. Reckendorfer's going to Europe.

X Q. 18. What connection was there between his going to Europe and the time you saw these pencils, by which you are, or profess to be, able to fix the exact time?

A. Because Mr. Reckendorfer intended to leave already in the early part of 1862, in order to talk with his partners on the other side in reference to the manufacture of certain pencils, among which those two kinds—the rubber-inserted and double-graded—were included.

X Q. 19. Those pencils which you say he showed you were made in Europe, were they not?

A. They were, as far as I can recollect.

X Q. 20. And sent over from there prior to the occasion you say Reckendorfer showed them to you?

A. Certainly.

221 X Q. 21. Had not his partners already seen them in Europe?

A. They must have seen them when they manufactured them, but I cannot say whether they have seen them outside of their own manufacture.

X Q. 22. Did his partners send them over?

A. They came with some other goods from his partners in Europe.

X Q. 23. Do you know when they came?

A. In 1861.

X Q. 24. Can you state what invoice?

A. I cannot.

X Q. 25. Can you state when the invoice was received in which they were contained?

A. I cannot, except by supposition.

X Q. 26. Do you remember its coming at any time?

A. I don't remember that they were ever mentioned on any invoice, but merely remember their being sent over from Europe.

X Q. 27. Could they come without being mentioned in an invoice?

A. Yes; by being sent by express as samples.

X Q. 28. Do you know how these were sent?

A. I do not.

X Q. 29. When did Mr. Reckendorfer intend to leave?

A. In the spring of 1862.

X Q. 30. What time in the spring?

A. About March.

X Q. 31. How do you know that he intended to consult about their manufacture?

A. Because he told me so.

X Q. 32. Did he tell you at the time he sailed, or at the time he originally intended to sail in March?

A. He told me so in the latter part of 1861.

X Q. 33. That, on the same occasion that he showed them to you?

A. No.

X Q. 34. Was it before or after?

A. It was before.

X Q. 35. How long before?

222 A. Shortly after they arrived from Europe, which was a short time—about a week—before this conversation took place.

X Q. 36. Now, can't you tell by what means they came from Europe?

A. I do not distinctly remember.

X Q. 37. Do you remember at all?

A. I remember that they came, but not the means how.

X Q. 38. How long was Reckendorfer gone to Europe?

A. From the middle of August, 1862, till the fore part of November, in the same year.

X Q. 39. Did he take these said pencils which he showed you, as you have testified, to Europe with him?

A. I do not remember whether he did or not.

X Q. 40. Did he tell you that he was going to do so; or did you understand that he did do so?

A. I don't recollect neither one nor the other.

X Q. 41. Did you see them again after he came back from Europe?

A. I have seen rubber-inserted and double-graded pencils afterwards, but whether they were the same pencils as shown me at the conversation referred to I do not know.

X Q. 42. On his return, in November, 1862, did he tell you the result of his consultation with his partners in Europe about them?

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Re-D. Q. 46. Where was Mr. Reckendorfer's factory in the years 1860, '61, '62, and '63?

A. His factory was in Fürth, Bavaria. He had no factory here.

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Subscribed and sworn to this 16th day of July, 1873.

E. G. THOMPSON.
Examiner.

Examination adjourned till July 17, 1873, at 10.30 a. m.

NEW YORK, *July* 17, 1873—10.30 a. m.

Present, Mr. Blake, of counsel for complainant, and Mr. Washburn, of counsel for defendant.

WILLIAM M. SCRIBNER, a witness produced on the part of the complainant, being first duly sworn, in answer to interrogatories propounded by counsel for complainant, says:

Q. 1. What is your name, age, residence, and occupation?

A. William M. Scribner; I am 49 years of age; I reside at Chicago, Ill.; I am an author and book-agent.

Q. 2. Do you know A. R. Dunton; and, if yea, how long have you known him?

A. I do; since 1848.

Q. 3. How did you make his acquaintance?

(Objected to as immaterial and irrelevant.)

A. By going to take writing-lessons of him.

Q. 4. Where was this?

A. At Boston, Mass.

224 Q. 5. Were you afterwards associated with him in business; and, if yea, from what date and in what business?

A. I was associated with him from February, 1848, in the writing business. I wish to say that I went to take writing-lessons of him, but did not take any, as he found me so proficient that he offered me a half interest with him at once, and we went into partnership.

Q. 6. How long did this partnership continue?

A. It continued until 1854—July, 1854.

Q. 7. Where did you carry on this business?

A. In different parts of Maine, and in Boston, Mass.

Q. You have stated that you formed your partnership in Boston. How long did you remain there before going to Maine?

A. Seventeen months.

Q. 9. How long was it before you and Mr. Dunton returned to Boston

(Objected to as assuming what has not been stated.)

—if at all?

A. We returned in May, 1852.

Q. 10. During the time that you were in partnership with Mr. Dunton did you live together.

A. Yes, sir.

Q. 11. During the time that you were in partnership and living together, did he use, for writing, a pencil or pencils having lead at one end and rubber inserted at the other?

A. Never.

Q. 12. What implement did he use for writing cards? Describe how it was made.

A. Strips taken from the oldest English 25-cent silver pieces which he could find.

Q. 13. How were these strips prepared for use?

A. By being cut into strips, filed in a vice, driven into pieces of white pine, and polished by filing and rubbing on a piece of leather.

225 Q. 14. Do you remember of his making charts, and exhibiting letters in various styles of writing?

A. I do.

Q. 15. Had you a property-interest in these charts, and what was it?

A. I had, one-half.

Q. 16. Who finished and shaded off the letters in these charts?

A. Mr. Dunton generally gave them in the rough, and then finished by such pencil-artists and lithographers as he could get to aid him.

Q. 17. Do you remember any one in particular who frequently aided him?

A. I could find them if I was in Boston. Maisel was one.

Q. 18. What implement did Dunton use in roughing out these charts?

A. Sometimes a large lead-pencil, and sometimes a pen.

Q. 19. During the period of time when you lived with Mr. Dunton, did you and he have your trunks in common—*i. e.*, did you both use the same trunks; and, if yea, how long?

(Objected to as leading.)

A. Yes; about six years.

Q. 20. Where was Dunton in 1855, if you know?

A. In Boston and immediate vicinity.

Q. 21. Do you recall any circumstance which makes you sure of this; and, if so, what is it?

A. Because of the revisions and improvements of our copy-books in various years.

Q. 22. Up to how late in the year 1855 was Dunton in Boston and vicinity?

A. December.

Q. 23. Please look at defendant's Exhibit E, and state whether, during the time you and Dunton lived together, he used pencils like that—that is, with lead at one end and rubber at the other.

A. Never.

226 And being cross-examined by Mr. Washburn, says:

X Q. 24. During all the time from February, 1848, till July, 1854, were you and said Dunton together in the same place, or places, teaching?

A. We were.

X Q. 25. Please state all said places and the respective times at each, in their order, commencing at the beginning.

A. Perhaps it would be quite impossible to do that, covering so many years and places.

X Q. 26. State as nearly as you can.

A. All the principal places in Maine, and the leading places in Norfolk and Suffolk Counties, Mass.

X Q. 27. Where did you commence?

A. Boston.

X Q. 28. How long did you stay there?

A. Seventeen months.

X Q. 29. Then you left Boston about July, 1849, did you?

A. That's the way I reckoned my time; I suppose it is correct.

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A. I do; since 1848.

Q. 3. How did you make his acquaintance?

(Objected to as immaterial and irrelevant.)

A. By going to take writing-lessons of him.

Q. 4. Where was this?

A. At Boston, Mass.

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Q. 6. How long did this partnership continue?

A. It continued until 1854—July, 1854.

Q. 7. Where did you carry on this business?

A. In different parts of Maine, and in Boston, Mass.

Q. You have stated that you formed your partnership in Boston. How long did you remain there before going to Maine?

A. Seventeen months.

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(Objected to as assuming what has not been stated.)

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A. We returned in May, 1852.

Q. 10. During the time that you were in partnership with Mr. Dunton did you live together.

A. Yes, sir.

Q. 11. During the time that you were in partnership and living together, did he use, for writing, a pencil or pencils having lead at one end and rubber inserted at the other?

A. Never.

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X Q. 27. Where did you commence?

A. Boston.

X Q. 28. How long did you stay there?

A. Seventeen months.

X Q. 29. Then you left Boston about July, 1849, did you?

A. That's the way I reckoned my time; I suppose it is correct.

X Q. 30. To what place did you then go first?

A. Augusta, Maine.

X Q. 31. How long did you stay there, and where did you go next?

A. I decline to go into this kind of detail.

X Q. 32. Why?

A. Because without the books here I could give only a general outline of dates of going from place to place.

X Q. 33. You are required to answer only so far as you recollect; and X Q. 31 repeated.

A To the best of my recollection, two months. Next, Waterville, Maine.

X Q. 34. How long did you stay there, and where did you go next?

A. About two months. Norridgewock and Skowhegan.

X Q. 25. How long did you stay there, and where did you go next?

A. Two months. Belfast; staid two months in Belfast, and then went to Hampden and Frankfort, and staid a month in each; then to
227 Bangor—staid there seven months; then to Corinth, Maine; Exeter, Stetson, Foxcraft, Dexter, and remained about three weeks in each; then to Bath for two months; then to Ellsworth, Maine, about two months; then Bangor for a year, more or less, including time teaching small schools while at the same time teaching in Bangor, at Orono, Stillwater, and Oldtown; then went to Boston, and remained there a little over two years.

X Q. 36. Did you remain Boston that last time, all the time?

A. We did.

X Q. 37. Was Dunton with you all the time, at all the places you have mentioned?

A. To the best of my recollection, he was.

X Q. 38. Where was your place of business the last time you were in Boston?

A. 228 Washington street all the time.

X Q. 39. After your connection with Dunton ceased, what did you next do?

A. Went into business with Crosby, Nichols & Co., school-book business, in Boston.

X Q. 40. How long did that continue?

A. With the list of that firm, till this date.

X Q. 41. Explain your last answer.

A. I mean to say that I sold the same list of books.

X Q. 42. Do you mean that you were in partnership with Crosby, Nichols & Co.?

A. I had the copyright or percentage on some of their books.

X Q. 43. What ones?

A. Copy-books and book-keeping.

X Q. 44. Was that all the business you had after you left Mr. Dunton till the present time?

A. It was.

X Q. 45. Had Crosby, Nichols & Co., previously to your going into business with them, sold the same copy-books?

A. They had.

X Q. 46. Are you the Scribner who was a member of the firm of Scribner, Dunton & Payson?

A. I am.

228 X Q. 47. What was the business of said firm?

A. Authors of copy-books.

X 48. You mean copy-writing-books?

A. Yes.

X Q. 49. Were those the copy-books which you have stated you had the copyright or percentage on from Crosby, Nichols & Co.?

A. They were.

X Q. 50. The Dunton of your firm of Scribner, Dunton & Payson was Seldom Dunton, the brother of said A. R. Dunton, was he not?

A. Yes.

X Q. 51. When did your firm of Scribner, Dunton & Payson commence?

A. In 1855.

X Q. 52. What time in 1855?

A. In the fall.

X Q. 53. Who claimed to be the author of those copy-writing-books? (Objected to as immaterial.)

A. Each of us, jointly.

X Q. 54. Between the time you left A. R. Dunton and the commencement of your firm of Scribner, Dunton & Payson, what business were you engaged in?

A. Teaching, I think.

X Q. 55. Where?

A. At Chelsea, Mass.

X Q. 56. Were you alone, or in connection with others; and, with whom?

A. Alone.

X Q. 57. How long did your firm of Scribner, Dunton & Payson continue?

A. Each continues to receive copyright to this date.

X Q. 58. It exists, then, the same, and for the same purposes as it has since its commencement?

A. Yes.

X Q. 59. Crosby, Nichols & Co. were the publishers, were they not, of your said copy-writing-books, and allowed your firm the percentage as the authors?

229 A. They were and they did.

X Q. 60. How long did they continue such publishers?

A. Till about 1860.

X Q. 61. Who then became your publishers thereof?

A. Crosby, Nichols, Lee & Co.

X Q. 62. How long did they continue, and who then became your publishers?

A. Two years, and then Crosby, Ainsworth & Co. till 1868.

X Q. 63. Who then became your publishers?

A. Woolworth, Ainsworth & Co. till the present time.

X Q. 64. That is a New York publishing house, is it not?

A. It is.

X Q. 65. Did not your said firm of Scribner, Dunton & Payson claim to be the authors of what said A. R. Dunton claimed that he was the sole author of?

(Objected to as immaterial.)

A. Being in the field in the western country, in the Pacific States, I cannot answer that question. I think we do.

X Q. 66. Don't you know that they do, and have done so ever since they commenced business?

(Same objection.)

A. I know that we have led, and he has followed.

X Q. 67. Question repeated.

A. I continue to make the same answer.

X Q. 68. Question repeated, and the examiner is requested to instruct the witness to answer the question.

(The witness is so instructed.)

A. I think we have—I do know that we have.

X Q. 69. Has not a very acrimonious contest been going on for years between your said firm and said A. R. Dunton on that subject?

A. A portion of the time.

230 X Q. 70. Is there not a suit at law still pending between your respective publishers on that subject?

A. I think there is.

X Q. 71. Have not you yourself and said A. R. Dunton been opposing and contradicting witnesses in such controversy and litigation?

A. I have not.

X Q. 72. Have not your partners, either or both?

A. I don't know positively.

X Q. 73. Are you on friendly terms with said A. R. Dunton?

A. I have not seen him for a good many years.

X Q. 74. Question repeated.

A. I don't know why I am not.

X Q. 75. Did you ever have any trouble or words with him at all?

A. Never have.

X Q. 76. When did you last see him?

A. Some time in 1856.

X Q. 77. Where and on what occasion?

A. In Boston—on the street, I think, the last time.

X Q. 78. Were you then on friendly terms with him?

A. I was.

X Q. 79. What department was yours when in partnership with said A. R. Dunton?

A. Teaching jointly with him.

X Q. 80. What time in 1856 was it that you last saw said A. R. Dunton?

A. During the Christmas holidays of 1855, and about January 1, 1856.

X Q. 81. When next last before that did you see said A. R. Dunton, and where?

A. I was seeing him continually all the previous fall at 114 Washington street.

X Q. 82. What time in the fall of 1855 did your firm of Scribner, Dunton & Payson commence?

A. I should think some time during the month of August.

X Q. 83. How often in 1855, after the commencement of your said firm, did you see said A. R. Dunton?

231 A. Should think quite every day, often at his request; in fact most all the time at his request, as he was continually importuning and desiring me not to join in the Payson & Dunton copy-books and their revisions, which had then been published some four or five years, but to still remain with him—acknowledging that he had not treated me right in the past, and to revise the books as I wanted them hereafter.

X Q. 84. Was that why you left him, because you thought he had not treated you right?

A. Not fully; but because we could not agree upon the arrangement of the books.

X Q. 85. Was it partly the reason?

A. I don't think it was.

X Q. 86. Is it possible that you will venture to swear that you saw A. R. Dunton every single day during the whole fall of 1855?

A. I should think that I could, very positively.

X Q. 87. Can you mention any special occasion, during the fall of 1855, when you so saw him?

A. I don't know as I could without memoranda and account-books, which I have. We were meeting so frequently, and he was so earnest that I should go on and revise books with him, and that he seemed so determined that I should, fearing that I would leave and go with other parties, or make books myself alone, that it don't seem to me possible but what we must have met every day, or nearly so.

X Q. 88. For these reasons, then, you state that you must have met every day, and not because you actually remember meeting him every day?

A. I say that it seems to me, to the best of my recollection, for the reasons aforesaid mentioned.

X Q. 89. How long did you remain in Boston after the fall of 1855?

A. I was there a portion of the time, perhaps most of the time, till 1860.

X Q. 90. Why did you not see said Dunton after the fall of 1855?

232 A. Probably because I spent a part of January, February, and March in the South, and probably Dunton had given up getting me as a partner, and hence ceased getting on my path as he had done all the fall.

X Q. 91. Did you then return to Boston and continue there?

A. I did.

X Q. 92. In the fall of 1855, when you saw him, was it always at his rooms, or elsewhere, and where?

A. He had no rooms at that time. I never sought meeting with him. He would watch for me on the streets, oftenest near the corner of Bedford and Washington streets, where I boarded, or at Tappan & Whittemore's book-store, where I used to frequent, and at other book-stores where I was friendly and used to call, persistently seeking interviews with me.

X Q. 93. Wasn't it always in the street or in those casual places that you met?

A. No; it was not. He seemed to be in my way, wherever it was, whether walking on Boston Common before breakfast or after tea.

X Q. 94. Then it was in such re-encounters only that you were accustomed to meet said Dunton, during the fall of 1855, and which you think he purposely brought about?

A. No. I don't mean to be understood in the first part of this question in this light, because many of our meetings were agreed upon at special times and at special places; sometimes on the Common, sometimes at 114 Washington street, sometimes at Jones, Ball & Poor's, and other places, where either or both of us were acquainted and would not feel that we were intruding. No. 114 Washington street is Tappan & Whittemore's.

Redirect:

Re-D. Q. 95. Your firm are not parties, i. e., they are not named in the proceedings in the suit you have mentioned, are they?

A. They are not.

And being further cross-examined, says:

Re-X Q. 96. Your publishers are, are they not?

A. As I understand it.

233 Re-X Q. 97. And your firm back your publishers up and furnish them with testimony in support of your claim of authorship as against said A. R. Dunton, do they not?

A. I am no party to it, to my knowledge.

Re-X Q. 98. Question repeated.

A. I don't know anything about it; my branch is another department.

Re-X Q. 99. You are so informed, or understand, do you not?

A. I do not. I don't understand anything about it.

W. M. SCRIBNER.

Subscribed and sworn to this 17th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

JOSEPH ILLFELDER, being recalled as a witness on the part of the complainant, in answer to interrogatories propounded by Mr. Blake, says as follows:

Q. 1. Have you been previously examined in this case?

A. I have.

Q. 2. Have you been present at the taking of any of the testimony in this cause; and, if so, when and where, and state whose testimony you heard?

A. I have been present at the cross-examination of Dunton, April 8, 1873, and other witnesses on defendant's part, examined at Boston; and also attended the examination of all the witnesses on complainant's part at Boston, Camden, and New York.

Q. 3. Since early in April you have been actively engaged in investigating and preparing evidence in relation to the Dunton pencils, have you not?

A. I have.

Q. 4. You are in the employ of and have charge of the factory of the Eagle Pencil Co., have you not?

A. Yes, sir; giving most of my spare time to the management of the factory.

234 Q. 5. Do you know the defendant's witness S. C. Thomas?

A. I do.

Q. 6. When did you first see him?

A. Parker House, Boston, about April 16th, 1873.

Q. 7. Narrate the circumstances which led to your making his acquaintance.

A. I was first informed by Mr. Wetmore—one of the counsel for complainant in this case—that Thomas stopped him on the street, urging him to listen to him, as he had some very important communications to make relating to the testimony given on the other side.

(This and such testimony objected to, so far as it is an attempt to get upon the record statements or pretended facts without competent proof.)

I next was informed by Mr. Lincoln (one of the counsel for complainant in this case) that Thomas had made him a statement in writing, which he handed to me and told me that Thomas wished to see me.

Q. 8. Have you that statement with you, and will you please produce it?

(Objected to on the ground that it is incompetent to prove any fact or statement contained in it; that it is not proper evidence in any respect, and its introduction can be intended only to get before the eye of the court things which the complainant has not proved or ventured to prove.)

A. I have, and do now produce it.

(Statement offered in evidence by counsel for complainant, and marked complainant's Exhibit, Jos. Illfelder, No. 1, E. G. T., Exr.)

(Same objections to the offer.)

Q. 9. Are you acquainted with the signature of S. C. Thomas?

A. I am.

235 Q. 10 How have you become acquainted with it?

A. I have seen him sign his name very frequently.

Q. 11. Is the signature to the statement his?

A. It is.

Q. 12. After you read this statement, did Thomas come to see you? And, if yea, when and where?

A. He did; at the Parker House, Boston, April 16, 1873.

Q. 13. State fully what passed between you at this interview.

(Same objections.)

A. He said I had very likely read his statement, and I should feel assured every part of it was true; said he felt very sorry that his mother got deceived—actually didn't know that she was to be drawn into it—and then went on and gave me the exact history of the pencil, Exhibit E; said that Dunton bought an old pencil, picked out the lead, and then went out and bought rubber; said that Dunton was perfectly delighted at having found an old pencil which was imported as long as twenty years ago, and also having succeeded in finding a piece of rubber of old age. He himself (Thomas) procured the glue; and after the pencil was finished Dunton dipped his fingers in ink and smeared it over the pencil; and, after consulting said Thomas whether the pencil looks old enough now, he, Dunton, said he was rather afraid about the fresh glue, as they might discover it. He further told me he would prove me that he tells me the truth, as he knows of one man who came to Dunton's rooms shortly after the pencil was made and Dunton tried to persuade and to convince him that he had seen him use such pencils at the time he was with him teaching. But this man could not remember anything of the kind. He gave me his name, which is Waterhouse. He then said, if desired, he would go to work himself to find out where the pencil and rubber was bought, and left me for the purpose of doing so.

(Same objections.)

236 I wish to add that, before he left, as a proof that he was telling me the truth, he told me that they wanted him to testify to Exhibit E, but he would not go into that trap, as he expressed himself.

(Same objections.)

Q. 14. Did you do anything in consequence of this conversation with said Thomas? And, if so, what was it?

A. Dr. Thomas did not return as he promised. I therefore made use of Mr. Lincoln's recommendation of one Mr. Ahearne, a private detective in Boston, and gave him instructions to find Thomas; but as he had no time to attend to that himself, I preferred to give him orders in regard to these old English Herrick & Blunt pencils, to find out where such pencils were for sale, advising him that he may be able to find them in old stationery-establishments only. He so did go to work, as he reported to me,

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A. I have.

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A. Yes, sir; giving most of my spare time to the management of the factory.

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selected his pencils, they told him, in the way of conversation, that they had not sold any such pencils lately except to one man whom they knew as a writing-teacher, whose name was Dunton, and who was very anxious at the time he bought those pencils to get some old stock. Mr. Ahearne's assistant, who could not find Thomas, I told Ahearne to employ to look up all stationery-stores in Boston, and to continue the search whether Dunton had looked for such pencils in any other place, or if he himself could find any more like Herrick & Blunt's pencils, and meanwhile left for New York.

(Same objections.)

237 Q. 15. Was Mr. Gay afterwards called as a witness in this case?

A. He was.

Q. 16. Did Thomas say anything to you, in the conversation you have described, in regard to a mistake in the date when he taught with Dunton; and, if so, what?

(Same objections as heretofore, and as leading.)

A. He did not at the first meeting; but at the second time I returned to Boston, I met Thomas at Young's Hotel, and he told me that he had another point to disclose to me, which he assured me was very important, mentioning that with regard to the date of Dunton having been in Camden in 1855 they all made a mistake, and he himself was the first man that could show Dunton that he persuaded him to testify to a lie, by showing him, after their testimony was taken, a certificate dated Camden, 1858 or 1857, which showed that Thomas was qualified to teach penmanship himself, and proved to Dunton that they were not teaching together in 1856; and as Dunton was in Camden for a few days, coming down from Belfast to call on his wife, Mrs. Dunton, who was on a visit at Mrs. Thomas' house at Camden at the time, which was a year previous to his teaching penmanship—Dunton was there in 1856, not in 1855. Thomas said Dunton was scared to death when he showed him said certificate, and begged him to destroy it. He so did, but still, by means of making me acquainted with different parties who knew about these dates, is able to prove to me that his statement is true.

(Same objections to this answer.)

Q. 17. Did you go to Camden, Maine, to learn about the Dunton pencils; and, if yea, when first?

(Same objections.)

A. I did; about April 29, 1873.

Q. 18. What caused you to go there at that time?

(Same objections.)

238 A. Thomas told me previous to my departure that Dunton had threatened his life, speaking about this date matter; telling him also his sister, Mrs. Barbour, would come to Boston to sustain her mother's statement. I therefore went to Camden with him—Thomas.

(Same objections to this answer.)

Q. 19. Did you find Dunton there?

A. I did.

Q. 20. What did he say and do there, that you saw and heard, about this pencil question?

A. Shortly after I had entered Mrs. Thomas' house Dunton came into the room, rushing around, using violent and abusive language, threatening that he would not let anybody touch his character; pulled off his coat, sat down next to me, and commenced telling me all possible stories about Thomas' character.

(Objected to, and the witness' general statements and conclusions, without specifying what he, Dunton, did in fact say.)

He said not to trust him.

Q. 21. In whose presence were these things said and done by Dunton?

A. Mrs. Rachel B. Thomas, her daughter, Mrs. Barbour, a witness who has testified in this case, and Silas C. Thomas.

Q. 22. Did you see the room occupied by Mrs. Thomas in her house, and the bureau in it?

A. I did.

Q. 23. Did you try the drawers with the keys you had in your pocket, and with what success?

A. I did. The first two keys I tried, each of them unlocked the drawer.

Q. 24. Was anybody present when you tried them; and, if yea, who?

A. I think Silas C. Thomas was present—that is, he tried his keys first, the first of which opened the drawer, and then I tried mine.

239 Q. 25. Did you see a telegram while there, signed A. R. Dunton; and, if yea, when and where, and under what circumstances?

(Objected to as an attempt to prove the contents of a paper, and as incompetent in every respect.)

A. I did, on May 2d, at Camden, Maine. While sitting at the desk in the telegraph office a man entered the office, handed me a slip of paper, which I read; and then, seeing it was intended for a dispatch, told him to hand it to the telegraph operator.

Q. 26. Was that the telegram that was put in evidence at Camden, Maine?

(Same objection.)

A. It was.

Q. 27. After the conduct of Dunton in Mr. Barbour's presence, which you have related, did you ask Mrs. Barbour to sign a statement of what she had told you in regard to the date of Dunton's visit?

(Same objections.)

A. I did.

Q. 28. Did she sign it?

(Same objections.)

A. She did not.

Q. 29. Did she give you any reason for not signing it; and, if yea, what?

(Same objections.)

A. She did, telling me that I had seen Dunton's manners myself, and that she was afraid to meddle with Dunton, and that I could easily comprehend why she refuses to sign a statement.

Q. 30. Did you again visit Camden, Maine, and when?

(Same objections.)

240 A. I did—May 27, 1873.

Q. 31. And at that visit did you remain till the testimony for the complainant was taken?

A. I did.

Q. 32. During that visit was Dunton at Camden, and, if yea, during how much of it?

A. He was—all of the time.

Q. 33. Did you see him at Mrs. Barbour's, and how often?

A. I did not.

Q. 34. Did you see him go to Mrs. Barbour's?

A. I did. While Mr. Blake, Mr. Wetmore, and myself were going up to Mrs. Barbour's residence, Dunton happened to see us leaving the hotel where we stopped, and turned right around, rushed up the same street ahead of us, entering Mrs. Barbour's house before we did.

Q. 35. On the day that Mrs. Barbour testified, did you go with a carriage to get her?

A. I did.

Q. 36. In what condition did you find her?

A. I found her in a great state of alarm——

(The witness's conclusions and constantly-repeated general statements and inferences are objected to——)

and she begged me, with tears, to spare her going to the hotel where she was to testify, as Dunton was in shortly before I came, threatening and terrifying her; and finally asked me if we could not take the testimony at her house, as Dunton told her he would come into the hotel as soon as she did, and under the circumstances she would be unable to testify.

Q. 37. Was her testimony afterwards taken at her own house?

A. It was.

Q. 38. You have stated in substance that Dunton used violent language in Mrs. Barbour's presence; state a little more fully what he said.

A. I did not pay very much attention to what he said, as it was
241 very disagreeable for me to be present, as a stranger, during the time he used this abusive language; but Mrs. Barbour told me afterwards——

(Objected to as hearsay)——

that after I left he lifted his fist against her brother Thomas, threatening him with the very words, that he would cut his damned head off, and she said it was only thanks to her brother's coolness and her own interfering that a terrible row was prevented.

Q. 39. Has Mr. Dunton been present during the taking of depositions in this cause; and, if so, how frequently?

(Objected to, except so far as the witness himself was shown to be present.)

A. He was in Camden when testimony was taken there on June 4; he was in Boston when testimony was taken there on complainant's behalf on the first time and also the second time.

Q. 40. Now, please state what directions you gave in regard to paying Dr. Thomas for what service he might render you in this matter?

A. I directed Mr. Lincoln to pay him five dollars per day.

Q. 41. For what days?

A. For as many days as I or he (Lincoln) required his services.

Q. 42. Do you know whether he has been paid any money yet?

A. I know that he has been paid twenty-five dollars on account.

Q. 43. And is that all?

A. I don't know; he (Lincoln) may have paid him something since, as there is more due to him.

Q. 44. Are Rachel B. Thomas, Dr. Thomas, and Mrs. Barbour related to each other; and, if so, how?

A. They are. The first-named lady is the mother of Silas C. Thomas and Mrs. Barbour.

Q. 45. Are the Pendletons related to the Thomases; and, if so, how?
242 A. Lavinia B. Pendleton is a sister of Mrs. Rachel B. Thomas.

Q. 46. Have you in your possession a photograph of A. R. Dunton?

A. I have.

Q. 47. Is it a good likeness?

A. It is.

Q. 48. Please produce it.

A. I do.

(Photograph offered in evidence, and marked "Complainant's exhibit, Jos. Illfelder, No. 2, E. G. T., Exr.")

Counsel for complainant requests the counsel for defendant to proceed to cross-examine the witness.

Counsel for defendant states that it is impossible for him to do so properly, as he requires sufficient time to examine the voluminous testimony of this witness taken on his direct examination, occupying some hours. That, moreover, it is now nearly five o'clock in the afternoon, and this session has lasted the whole day. That it is unreasonable to require the cross-examination to proceed at this time, and the demand of the counsel for the complainant that it should can only be ascribed to a disposition to prevent a proper and sufficient cross-examination of a witness who has given such remarkable testimony.

Counsel for defendant further states, that he has been ready to devote the whole week up to this time to attendance upon the taking of the complainant's testimony, which was adjourned from last week till Monday morning of the present week.

That complainant adjourned for their own convenience until Tuesday,
and chose to take no testimony at all on Monday. That yester-
243 day the complainant's counsel moved to adjourn at about three
o'clock p. m., defendant's counsel being then present and urging them to continue until a later hour, and they having present the same witness, whose direct examination has now been taken, but they declined.

That it is now very unreasonable to insist upon this cross-examination proceeding to-day, and counsel for defendant requests the examiner to adjourn the examination till to-morrow, at a reasonable hour.

Examination adjourned, at the request of Mr. Washburn, till July 18, 1873, at 10.30 a. m.

NEW YORK, *July* 18, 1873—10.30 a. m.

Present, counsel as before.

Counsel for complainant offers in evidence an authenticated record of the conviction of A. R. Dunton for petit larceny, marked "Complainant's exhibit X, E. G. T., Exr."

(Objected to as entirely immaterial, irrelevant, and incompetent, and because such record cannot be considered as proper evidence to affect the credibility of the witness, A. R. Dunton, and the complainant has failed, and has made no attempt to affect his credibility by the only legal testimony which can be used for such purpose. The witness, Dunton, is a man well known in the community where he has resided and done business for a great many years, and his character for truth and veracity can be easily proved. Failing to do so, and resorting to
such testimony as this record, is a confession that his general
244 reputation for truth and veracity cannot be impeached, and is a
clear attempt to prejudice the court by irrelevant matter.)

Counsel for complainant offers in evidence certified office-copy of the files and records of the specification, oath, and drawing in the matter of the letters-patent granted Joseph Reckendorfer, dated November 4, 1862, No. 36854, for improved pencil of Joseph Reckendorfer, for the letters-patent named in the bill of complaint, marked "Complainant's exhibit Y, E. G. T., Exr."

And the witness, JOSEPH ILLFELDER, being cross-examined by Mr Washburn, says:

X Q. 49. You are, are you not, the same Joseph Illfelder who was an

applicant in and party to the interference heretofore pending in the Patent-Office, between said Philip Hufeland, said Joseph Reckendorfer, said T. H. Muller, and Samuel D. Hovey, for a paper-encased rubber pencil, in which interference the letters-patent of said Philip Hufeland, put in evidence by defendant herein, were granted, and of which paper-encased rubber pencils complainant's Exhibit No. 2 are specimens?

A. I am. I don't know whether Exhibit No. 2 is the pencil that was in interference, but can tell when I see it. After referring to the complainant's testimony, I can state that it is the same pencil which the answer to X Q. 17, when I first testified in this case, includes.

X Q. 50. You claimed, did you not, in your application in that interference, that you yourself were the first and original inventor of that paper-encased rubber pencil?

A. I did.

X Q. 51. Said Joseph Reckendorfer, the complainant, in his application, also in that interference, at first claimed that he was the first and original inventor of that paper-encased rubber pencil, did he not?

(Objected to as immaterial and as not being the best evidence.)

245 A. He did.

X Q. 52. You made your said claim subsequently to said Reckendorfer making his, did you not?

A. I think I did.

X Q. 53. And then said Reckendorfer withdrew in your favor, did he not, leaving you to contest the claim in said interference case with said Hufeland?

(Same objection.)

A. I think he did.

X Q. 54. Said interference was heard by all the tribunals of the Patent-Office, and by all decided against you, were they not?

(Same objection.)

A. They were decided against me, on the ground that an invention made in Europe does not relate to this country, as I understood it.

X Q. 55. Did they not, or any of them, in said decisions, express themselves to the effect that the testimony on your part in said interference was of doubtful credibility?

(Same objection.)

A. Not that I remember. The Eagle Pencil Co. regularly receive their invoices, on which all the goods are mentioned, which are sent from our European factories, but if there are only samples sent, they make a memorandum of that, in the weekly memorandum slips, which designate if there are pencils in the case for other parties in this country, with their own name on them, and also if special samples are sent. We did not know that such memoranda might be of importance once, and regularly destroyed them; and so it happened that I could not bring this proof.

(All this answer objected to, as not responsive, except the first sentence.)

X Q. 56. After said Joseph Reckendorfer had made oath that
246 he himself was the first and original inventor of the said paper-encased rubber pencil, he became your principal witness to prove that you were the first and original inventor, did he not?

(Same objection.)

A. He was one of the principal witnesses, as far as I can recollect, because I sent him those pencils.

X Q. 57. After said interference case was decided by the Patent-Office adversely to you, then this suit against Mr. Faber, the assignee of said

Hufeland, and who made and sold said paper-encased rubber pencils for which said patent was granted to said Hufeland, was commenced, was it not?

(Same objection.)

A. In the first place, I did not know that Faber owns that patent, as Faber as well as Hufeland swore, if I remember right, that the patent is not assigned, nor is it intended to be assigned.

The commencement of our suit, as far as I can recollect, was quite independent of this former matter, and commenced as soon as Faber brought his rubber-inserted pencils into the market.

X Q. 58. Don't you know that in that interference case testimony was introduced on the part of said Hufeland, in opposition to your said claim, to the effect that the sale of said rubber-encased paper pencils was commenced by Mr. Faber in the summer of 1871, and had ever since been continued, and do you not also know that the delivery to Mr. Faber of an assignment of his said claim, by said Hufeland, executed in blank, was admitted upon the examination of your own lawyer, Mr. Pollok, and that Mr. Faber controlled the said invention of said Hufeland, who was in his employ?

(Same objection.)

A. I don't remember anything about the sale of the pencils, but believe there was some blank assignment held by Faber.

247 X Q. 59. Did you attend upon the taking of the testimony in that interference case?

A. I did.

X Q. 60. Did you hear the testimony of William K. Evans, and W. H. B. Smithson, and Eberhard Faber, and said Philip Hufeland, witnesses on the part of Hufeland in that case?

A. I don't remember having been present all the time.

X Q. 61. Do you remember hearing the testimony of either of them, and which?

A. Yes, I think I heard Mr. Evans' and Mr. Faber's; but I am positive that I heard Mr. Hufeland's testimony.

X Q. 62. Don't you know that Mr. Evans' said testimony was almost entirely, if not wholly, to prove sales of said pencils by Mr. Faber for a considerable time prior thereto?

(Same objection.)

A. Yes, I believe it was.

X Q. 63. State when, and for how long each time, you attended at Boston and Camden on the taking of testimony on the part of complainant in this suit?

A. I attended at Camden June 4th one day, and at Boston June 6th and 7th; again at Boston June 24th till the 28th.

X Q. 64. When did you go to Camden last, prior to June 4th?

A. May 27th.

X Q. 65. Then from May 27th to June 4th you were at Camden and vicinity, were you?

A. I was.

X Q. 66. Did Silas C. Thomas go and remain with you there during that time?

A. He did not.

X Q. 67. Was he there during that time, or any part of it; and, if so, what?

A. He was not.

X Q. 68. Had you, previously to May 27, been in Camden; and, if so, when?

A. I had, on the 29th or 30th of April.

X Q. 69. How long did you remain?

248 A. A few days; about a week; up to May 6th.

X Q. 70. Was said Thomas with you during the whole or any part of that time?

A. He was; all the time.

X Q. 71. Did he go there with you?

A. He did.

X Q. 72. Where did you go there from?

A. From Boston.

X Q. 73. How long had you been in Boston?

A. About a week.

X Q. 74. Where were you between the 7th of June and the 24th of June?

A. In New York and Yonkers.

X Q. 75. Did you return to New York after the 28th of June? If not, where were you during the next two weeks?

A. I did return, and have been partly in New York and partly at Yonkers.

X Q. 76. When you were in Boston at the different times you have mentioned, after the 29th or 30th of April, were you accustomed to see and have interviews with said Thomas?

A. Yes, sir.

X Q. 77. Were some of them at said Thomas' house in East Boston?

A. I remember one.

X Q. 78. Is one all that occurred at his house?

A. No; I was at his house once before I left for Camden.

X Q. 79. Did you have interviews with said Thomas' wife, who was called as a witness for complainant?

A. I did.

X Q. 80. Were these various interviews, and did you spend your time in said Camden and Boston at the various times you have mentioned, for the purpose of obtaining testimony for the complainant in this case?

A. Not all of them.

X Q. 81. For what other purpose were those interviews?

A. After Silas C. Thomas had informed me about the date fraud,

249 I didn't believe him exactly what he told me, and wanted him to prove me, if possible, that his statement was true. He said I can speak to his wife, and then shall judge for myself whether what he said was true or not. I therefore went over to East Boston to see Mrs. Thomas.

X Q. 82. Was not Silas C. Thomas at the Parker House at various times—June 6th and 7th last—when testimony was being taken in one of the rooms in the Parker House on behalf of the complainant?

A. Not that I know of, as I specially told him before I left Boston, May 27th, that I didn't require his services any further.

X Q. 83. Did you see him, during that time you were in Boston, taking testimony on behalf of complainant?

A. I think I did just before I left for New York, but not during the time testimony was taken.

X Q. 84. You could, could you not, have procured him as a witness for complainant if you had wished?

A. Yes, sir; as he was very desirous to testify, not caring to perjure himself.

X Q. 85. Do you consider that there is anything whatever in his testimony, taken on the part of defendant, which is contradicted by what

you say he told you, except the alleged error, and, if an error, a trivial and immaterial one, of the statement that he and Dunton were giving writing lessons in the fall of 1856 at various places in Maine, instead of 1857?

(Objected to as immaterial.)

A. I think there is. He kept very silent about his own exhibit, which was exhibit G, if I remember right.

X Q. 86. You are not required to testify as to what he kept silent about, and did not say, but with reference only to what he did tell you; and the 85 X Q. is repeated, and you are required to specify in what other respect, if any, beside the supposed error in the date of 1856, or 1857, he contradicted his testimony.

(Same objection.)

A. Then I may state that he did say the whole of the testimony is a conspiracy.

250 X Q. 87. The whole of whose testimony?

A. Dunton and himself were the leaders.

X Q. 88. Did he tell you that he himself had committed perjury?

A. I told him that we could not use his testimony, because he would perjure himself.

X Q. 89. In what respect would he perjure himself if he had been called as a witness for complainant, and sworn to precisely what you say he told you?

(Objected to as incompetent.)

A. In regard to the date error, as described before, and to his having seen Dunton use pencils with rubber in the end.

X Q. 90. You have not before stated that he told you that he had not seen Dunton use pencils with rubber in the end, nor is it contained in Thomas's statement, which you have produced. Do you mean to swear now that Thomas did tell you specifically that he had never seen Dunton use such pencils, and that he had perjured himself in testifying that he had; and, if so, why did you not have that included in his written statement?

(Objected to in form and substance.)

A. I do swear that he told me that Dunton had never used pencils with rubber in the end, and he thinks, as he told me at the time, he did not swear to that; with the statement which Thomas made to Mr. Arthur Lincoln I have nothing to do.

X Q. 91. Why did you not mention this alleged statement of Thomas to you, when you professed to state all he told you, on your direct examination?

A. On my direct examination, I stated pretty near all he said at the first interview I had with him at the Parker House, Boston.

X Q. 92. Question repeated.

A. Referring to my last answer, I was not questioned to that effect on my direct.

X Q. 93. How often have you seen said Thomas write his signature?

A. Good many times.

251 X Q. 94. How many, and to what papers?

A. I could not state exactly how many times, but I know at one time he showed me his handwriting, and signed his name on some paper four or five times; then again I seen him sign a dispatch. I also remember he showed me once a letter which he wrote to his wife, and was proud that he could mention in it that he had not taken a drop of liquor during the time he was out of town; I also then seen his signature.

X Q. 95. The room that you state was Mrs. Thomas' room, where the bureau was, the drawers of which you opened with your keys, was on the first or ground floor of the house, was it not?

A. Yes; it is Mrs. Thomas' sleeping-room.

X Q. 96. Did you pay, or did any one on behalf of complainant pay, or agree to pay, the wife of Silas C. Thomas anything; and, if so, what?

A. I think Mr. Blake told Mrs. Thomas, in your presence, when she was to be recalled for further cross-examination, that her loss of time she should understand would be paid; but I don't know whether or how much she has been paid.

X Q. 97. How much time has Mr. Thomas spent in the employment of the complainant in aiding them in this case?

A. I couldn't say exactly. Mr. Ahearne, the detective who assisted me, had also used his services sometimes. All the time he spent with me was about twelve or fourteen days.

X Q. 98. Has he presented any bill, or made any claim for payment for his said services?

A. He may have presented his bill to Mr. Arthur Lincoln in Boston. In fact, I informed Mr. Lincoln to get his bill.

X Q. 99. For how much did he present his bill?

A. I can't say.

X Q. 100. Have you not been informed of the amount, or received any information about it?

A. I left Mr. Lincoln a memorandum of the number of days
252 Thomas spent with me, and told him, after Thomas hands in his bill he should see Ahearne, how many days he spent with him, if any, and shall then settle it, if there is no discrepancy on account of days.

X Q. 101. Question repeated.

A. I don't know that he ever presented any bill.

X Q. 102. Don't you know that he has made a claim, or stated what he considers himself entitled to, for his said services, or have you not been so informed?

A. No.

X Q. 103. Where did you obtain the photograph which you have produced, and which you say is the photograph of A. R. Dunton?

A. I received two photographs; Mrs. Barbour, as well as her sister, Mrs. Philebrooks, didn't want to have Dunton's picture in the house any longer, after the abusive attack at Mrs. Rachel B. Thomas' house, and I asked them if I may take them then. This is one of them.

X Q. 104. Where is the other?

A. I lost it.

X Q. 105. When and where?

A. If I knew it, I could find it.

X Q. 106. When did you first miss it?

A. After I returned from my first Camden trip I looked for two, but only had one.

X Q. 107. Where was that?

A. New York.

X Q. 108. Did you keep them together?

A. I think I did first.

X Q. 109. Were they together up to the time of your missing the one, so far as you know?

A. I had them in the same valise.

X Q. 110. Were they together in the same place in the same valise?

A. They were, or at least should have been, amongst my letters in that valise.

X Q. 111. Did any one besides yourself; and, if so, who, have access to that valise?

A. Yes, because it wasn't locked; but I don't believe anybody
253 took it out. I may have left it behind at the Parker House, where I stopped a few days before returning to New York.

X Q. 112. Do you know when the photograph you have produced was taken?

A. I don't.

X Q. 113. From whom did you get that one?

A. I think Mrs. Philebrooks.

X Q. 114. Do you know how long she had it?

A. I don't.

Redirect:

Re-D. Q. 115. Were you instructed by your counsel that it was proper for you to pay Dr. Thomas and his wife a fair compensation for their work per diem?

A. I was.

JOSEPH ILLFELDER.

Subscribed and sworn to this 18th day of July, A. D. 1873.

E. G. THOMPSON,
Examiner.

Examination adjourned till July 19, 1873, at 11 a. m.

NEW YORK, *July 19th*, 1873—11 a. m.

Present: Counsel for both parties.

Counsel for the complainant offers in evidence certificate of the Librarian of Congress, to the effect that he has made diligent search of the copyright records in his custody, entered by A. R. Dunton, or any other person, of the Duntonian system of rapid writing, and finds the first copyright thereof to have been entered at the date and by the party in said certificate mentioned, marked "Complainant's Exhibit Z, E. G. T. Exr."

(Objected to as immaterial and irrelevant.)

Examination on the part of the complainant closed.

254 *Complainant's Exhibit X—E. G. T., Ex'r.*

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office
[L. S.] of the clerk of the county of Monroe, and clerk of the supreme court of said State, for said county, do find a certain record of conviction there remaining, in the words and figures following, to wit:

(Copy.)

Record of conviction.

MONROE COUNTY, *Town of Sweden:*

At a court of special sessions of the peace, held this 25th day of

October, 1861, by me, at my office, in said town and county, Alvin R. Dunton was convicted on a charge of having, on the 19th day of October, at the village of Brockport, in said county, stolen and feloniously taken one silk dress-pattern of the value of $9\frac{38}{100}$, the property of George H. Allen, which charge being stated in the warrant by me issued, was distinctly read to the defendant in open court, to which he pleaded guilty. Whereupon such proceedings were had in the said court that the defendant was convicted of the charge above specified.

And, upon such conviction, I did adjudge and determine that the said Alvin R. Dunton should be imprisoned in the Monroe County penitentiary ninety days.

In witness whereof I have hereunto set my hand and seal this 28th day of October, 1861.

[L. S.] AUSTIN HARMON,
Police Justice.

255 All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness, E. Darwin Smith, justice, at the city of Rochester, the 28th day of March, in the year of our Lord one thousand eight hundred and seventy-three, of our Independence the ninety-seventh.

[L. S.] A. L. MABBETT, *Clerk.*

I, E. Darwin Smith, justice of the supreme court of the State of New York, do hereby certify that Alonzo L. Mabbett, whose name is subscribed to the preceding exemplification, is the clerk of the said county of Monroe, and clerk of said supreme court for said county, duly elected and sworn, and that the signature of said clerk to said certificate is genuine, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

E. DARWIN SMITH.

Dated Rochester, N. Y., March 28th, 1873.

STATE OF NEW YORK,
County of Monroe, ss:

I, Alonzo L. Mabbett, clerk of the supreme court of said State in and for the county of Monroe, do hereby certify that E. Darwin Smith, whose name is subscribed to the preceding certificate, is justice of the supreme court of said State, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 28th day of March, 1873.

[L. S.] A. L. MABBETT, *Clerk.*

256 *Complainant's Exhibit Joseph Illfelder, No. 1—E. G. T., Ex'r.*

STATEMENT OF DR. S. C. THOMAS.

APRIL 15, 1873.

Mr. Thomas says: "The old English pencil was bought by A. R. Dunton, and the rubber inserted in it, in my presence, in his rooms. Dunton told Peter Thacher he thought he could find another pencil in Camden, Maine—an eraser pencil—that he had manufactured in 1855, that he left there. Dunton said he would go to Camden for $25, and

went. When he came back, Dunton told me, by a little hocus-pocus game, 'I got that pencil into the bureau, and made her search for it the next day, and she found it there.'

"He made the pencil at room No. 9, 14 Tremont street. I got a note, requesting me to call at his office about the 7th or 8th of February, and I went up there, and I was in his office most every day. He made the pencil before he went to Camden. He went out and bought the oldest one he could find. He searched for a week for rubber to go back of the date—he had three kinds. Then he glued it up with common glue. I went out and bought it at Doolittle's & Smith's, and then he glued it when I returned. He went out and bought the rubber and pencil when I stayed there. He got some old rubber, made as far back as 1845 or so, I think.

"He (Dunton) asked my cousin and my aunt, who testified, to go and find some pencils; said they must find some, and they did. They had said that all the pencils were burnt up. All this he can swear to."

"S. C. THOMAS."

In presence of—
ARTHUR LINCOLN.

Mr. Thomas says he will make this still stronger under oath.
ARTHUR LINCOLN.

APRIL 15, 1873.

257 Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of CHARLES W. HENDERSON, taken on behalf of the complainant, before Frederick Dodge, notary public and special examiner of said court, on Friday, July 18th, A. D. 1873, at Boston, in the district of Massachusetts.

Arthur Lincoln, esq., appearing for complainant, and P. Thacher, esq., for defendant.

Direct interrogatories by Arthur Lincoln, esq., for complainant, and answers of the witness thereto.

[At eleven o'clock a. m., on the above day, the above-named witness and counsel having appeared before me, an adjournment until three o'clock p. m., of the same day, was agreed upon by said counsel. F. Dodge, notary public and examiner, July 18, 1873.]

[At three o'clock p. m., on the same day, the witness and counsel named above being present, the defendant's counsel objects to any testimony on the part of said witness, offered by the plaintiff, on account of a want of proper and sufficient notice, and because it was specially agreed between the counsel of the respective parties at the time the testimony of George F. Milliken was commenced, and taken so far as it was taken, that no further testimony should be taken in Boston, on the part of the plaintiff, than to complete the testimony of said Milliken-and because said Milliken is not now produced as a witness, but a dif, ferent person.]

258 Int. 1. What is your name, age, residence, and occupation?

A. Charles W. Henderson; age, twenty-nine; reside in Chelsea; telegrapher for the Western Union Telegraph Company in Boston.

October, 1861, by me, at my office, in said town and county, Alvin R. Dunton was convicted on a charge of having, on the 19th day of October, at the village of Brockport, in said county, stolen and feloniously taken one silk dress-pattern of the value of $9\frac{38}{100}$, the property of George H. Allen, which charge being stated in the warrant by me issued, was distinctly read to the defendant in open court, to which he pleaded guilty. Whereupon such proceedings were had in the said court that the defendant was convicted of the charge above specified.

And, upon such conviction, I did adjudge and determine that the said Alvin R. Dunton should be imprisoned in the Monroe County penitentiary ninety days.

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Police Justice.

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County of Monroe, ss:

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[At three o'clock p. m., on the same day, the witness and counsel named above being present, the defendant's counsel objects to any testimony on the part of said witness, offered by the plaintiff, on account of a want of proper and sufficient notice, and because it was specially agreed between the counsel of the respective parties at the time the testimony of George F. Milliken was commenced, and taken so far as it was taken, that no further testimony should be taken in Boston, on the part of the plaintiff, than to complete the testimony of said Milliken-and because said Milliken is not now produced as a witness, but a dif, ferent person.]

258 Int. 1. What is your name, age, residence, and occupation?

A. Charles W. Henderson; age, twenty-nine; reside in Chelsea; telegrapher for the Western Union Telegraph Company in Boston.

Int. 2. What is your relation to the Western Union Telegraph Company at Boston?

A. I am chief operator at the Boston office.

Int. 3. Have you access to the files of dispatches in said Boston office, and custody of them?

A. I have.

Int. 4. Have you, during the month of May last past, received at said office any dispatch from Camden, Maine, signed by one Dunton, and addressed "Stephen Thacher & Co.," or "P. & S. Thacher," or "P. Thacher?"

(Objected to by defendant's counsel, as calling for a privileged communication, and because the testimony called for would be inadmissible, and the interrogatory is irrelevant, as the testimony would be, should the answer be such as the plaintiff desire; not waiving, however, the objection previously stated, as to want of notice by this or any subsequent objection.)

A. We have received one for Stephen Thacher & Co.

Int. 5. What is the custom of your office as to the delivery of dispatches, if you know?

(Objected to as immaterial and irrelevant.)

A. Dispatch is received, enclosed in an envelope, entered on delivery book, and handed to the messenger, who, upon delivery, obtains the signature to whom the message is addressed.

Int. 6. Will you please produce the dispatch received from said Dunton, mentioned in your answer to the fourth interrogatory?

(Defendant's counsel repeats the objection made to the fourth interrogatory. Also objects to this interrogatory as immaterial and
259 irrelevant; also to anything other than an original paper, and to any secondary evidence of its contents, there being no proof of any effort to obtain the original.)

A. I will, and do now produce it. This is not the original, but a press copy.

Int. 7. Have you any further copy of this dispatch?

(Same objection as to interrogatory 6.)

A. Nothing more than a copy taken from the press copy, which I now produce.

(The copy produced is offered in evidence, and has been marked and identified by the magistrate "Exhibit Henderson 1," and is hereto annexed.)

Int. 8. Why do you not produce the original or the press copy you speak of, to be filed with the testimony you are now giving?

(Objected to as immaterial and irrelevant.)

A. I cannot produce the original, as it is supposed to have been delivered to the parties to whom it was addressed. The reason why I do not produce a press copy is because we require it for our files at the office, by the custom of the office.

Int. 9. What do you know, if anything, as to the delivery of this dispatch, a copy of which you have produced?

(Objected to as immaterial, irrelevant, and incompetent.)

A. I know, by referring to our delivery-book, (evidence of contents of any paper or book not in the case objected to,) that the message was delivered at 2.30 p. m., to a party signing themselves "P. & S. Thacher," May 2, 1873.

Int. 10. Have you the delivery-book in your hand, and are you reading from said book?

A. I have; I am reading from said book.

Int. 11. Who is the manager of the Western Union Telegraph Company in Boston?

(Objected to as irrelevant and immaterial.)

260 A. George F. Milliken.

Int. 12. Is he at the office now; and, if not, where is he?

(Same objection as to last interrogatory.)

A. He is not, and I do not know his whereabouts. He is away on a vacation.

Int. 13. Whether or not you are the acting manager in his absence?

(Same objection.)

A. I am.

Cross-interrogatories proposed de bene esse by P. Thacher, esq., counsel for defendant, and answers of the witness thereto:

X Int. 1. When you say that you produce here a press copy of the telegram inquired about, do you not mean merely the press copy of what was written down here in your office by one of your operators?

A. I do.

X Int. 2. Did you ever see the original telegram, which, according to your supposed copies, was sent from another point to this city?

A. I never did.

X Int. 3. Do you know the handwriting of A. R. Dunton, or of P. and S. Thacher?

A. I do not.

X Int. 4. Is it not a rule of your office that telegrams are held as confidential, so as not to be exposed or shown to other parties, who may desire, for any reason, to see them, without the consent of the person who sent or the person who received such dispatch?

A. It is, unless ordered by a court to produce them.

X Int. 5. Have you been ordered by any court to produce any telegrams or records of any kind of your office in this case?

A. I have.

X Int. 6. By what court; and where is the order commanding you to produce them?

(Objected to as incompetent and irrelevant.)

261 A. By the circuit court of the first district—Massachusetts district.

(The counsel for complainant objects to the production of said order as uncalled for, and not required by any rule of law, and on the ground that the defendant is not entitled to the same. Said counsel also advises said witness that he is not bound to produce said order.)

I have the order in my hand.

X Int. 7. Will you please annex said order to your deposition?

(Counsel for complainant advises the witness that he is not obliged so to annex said order, and further, on the ground that he might criminate himself.

Counsel for defendant objects to counsel for complainant interfering in the cross-examination of said witness, and directing him what to do or not to do, or advising him, the witness having sworn to testify without regard to who may put the interrogatories.)

A. I will.

(Said order is here produced, to be annexed, and has been marked and identified by the magistrate "Exhibit Henderson 3," and is hereto annexed.)

X Int. 8. Have you ever been required to testify in this case previously to this examination?

A. I have not.

C. W. HENDERSON.

Sworn to and subscribed before me.

F. DODGE,
N. P. and Examiner.

JULY 18, 1873.

262 *Exhibit "Henderson 1," marked and identified July 18, 1873, F. Dodge, notary public and examiner.*

Blank No. 1.]

THE WESTERN UNION TELEGRAPH COMPANY.

The rules of this company require that all messages received for transmission shall be written on the message-blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following messag e.

WILLIAM ORTON, *Prest.*,
GEO. H. MUMFORD, *Secy.*, } *New York.*
THOS. T. ECKERT, *Genl. Supt.*,
New York.

Dated Camden, Me., 1873. Received at 2.16, May 2.

To STEPHEN THACHER & CO.,
Attorneys at Law:

I find it was eighteen fifty-seven that Thomas taught with me in this vicinity.

A. R. DUNTON.

15 coll.—G. W.

UNITED STATES OF AMERICA,
State and District of Massachusetts, County of Suffolk:
[L. S.]

I, Fred'c Dodge, a notary public in and for said county and State, duly appointed and qualified, do hereby certify:

That the reason for taking the foregoing deposition is, that the testimony of the deponent is material and necessary in the cause named below, and that said deponent resides more than one hundred miles from the place of trial of said cause.

That on the eighteenth day of July, A. D. eighteen hundred and seventy-three, at Boston, in said county, I was attended by Arthur Lincoln, esq., counsel for complainant, and P. Thacher, esq., counsel for defendant in said cause, having been first appointed special examiner of said court named below, and duly furnished with a copy of
263 the bill and answer in said cause, under Rule 67 of said court, and by Charles W. Henderson, the said witness, who was of sound mind and lawful age; and the said witness, having been by me carefully examined and cautioned, and sworn to testify the whole truth relative to the issue, gave the foregoing deposition, in answer to interrogatories and cross-interrogatories proposed by the counsel above named respectively; and the testimony given by him was by me reduced to writing, in the presence of the deponent, and he afterwards subscribed the same, in my presence, as and for his deposition.

That it is agreed by the parties that said deposition shall be transmitted by me to E. G. Thompson, esq., special examiner of said court in New York, and that I have retained it to be so transmitted.

Taken at the request of the complainant in a certain civil cause pending in the circuit court of the United States for the southern district of New York, in equity, wherein Joseph Reckendorfer is complainant, and Eberhard Faber is defendant.

And I certify that the adverse party was present at the taking of said deposition, and put such interrogatories as he thought fit, by his counsel, P. Thacher, esq.

I further certify that I am not of counsel or attorney for either of the parties in said cause in which said deposition was taken, nor in any manner interested in the event of said cause.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this eighteenth day of July, A. D. eighteen hundred and seventy-three.

F. DODGE,
Notary Public and Examiner.

Fees:	Witness, travel, 1 m.; attendance, 1 day	$1 60
	Magistrate, taking	5 00
		$6 00

264 *Exhibit Henderson 2, marked and identified, F. Dodge, N. P. & spec. exam. July 18, 1873.*

To the honorable the justices of the United States circuit court for the first circuit:

MASSACHUSETTS DISTRICT, *ss:*

Humbly complaining, represents unto your honors your petitioner, Joseph Reckendorfer, of the city, county, and State of New York:

That there is now pending in the United States circuit court for the southern district of New York, a suit in equity in which the petitioner herein is plaintiff and Eberhard Faber, of said New York, is defendant;

That Edward G. Thompson, esquire, one of the examiners of said court, has been duly appointed special examiner, to take testimony in said suit at the city of Boston, in said district of Massachusetts, among other places, as appears by the order of court; a copy thereof is hereto annexed and referred to;

That said special examiner has been, and is now, taking testimony in said suit in said Boston, and one George F. Milliken, of said Boston, the manager of the Western Union Telegraph Company, has been duly summoned, in and by virtue of the subpœna hereto annexed, to appear before said special examiner to testify and give evidence of what he knows relating to said cause, and to bring with him the telegraphic dispatch in said subpœna referred to, on the part of said plaintiff. That the said Milliken, in answer to said summons, has duly appeared in his own person before said special examiner, and has been partially examined as to what he knows relating to said suit; that said examination of said Milliken is now pending; that a certified copy of the testimony and proceedings before said special examiner, so far as said Milliken is concerned, is hereto annexed.

That said witness, Milliken, refuses to submit to examination in re-

gard to, and to produce the telegraph-book and dispatch referred
265 to in said examination, and especially in the seventh interrogatory thereof, all of which fully appears in said certified copy.

Therefore this petitioner prays this honorable court to order the said Milliken to submit to examination in regard to, and produce the book inquired about in said examination, and produce the dispatch mentioned in the seventh interrogatory thereof, if there be such in the office of the Western Union Telegraph Company at Boston, and that an attachment may issue for said contempt of court and for said refusal to testify and to produce said book and dispatch.

By LATHROP & BISHOP, AND
ARTHUR LINCOLN,
His Attorneys.

And now, to wit, July 17th, 1873, upon the filing of the aforesaid petition, the said Milliken, the witness mentioned therein, appearing and submitting to the order of the court, and stating that he will be governed by the opinion of the court as to answering questions put to him, and as to producing the book and dispatch mentioned in said examination, and the court being of the opinion that he, the said Milliken, should submit to examination in regard to the book inquired about in said examination, and should produce so much of said book as relates to said dispatch, and should produce said dispatch or a copy thereof, it is ordered that further hearing upon said petition be postponed till the nineteenth day of July current, in order that the witness may have opportunity to so submit to examination and to produce so much of said book and said dispatch, or a copy thereof, when such further order will be then entered as may seem proper and right in the premises.

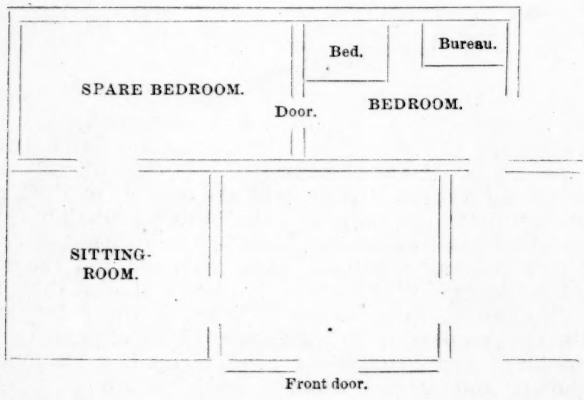
By the court:

JOHN G. STETSON, *Clerk.*

A true copy of petition and order of court thereon.
Attest:
[L. S.]

EDWIN T. NASH,
Deputy Clerk.

266 *Complainant's Exhibit Barbour No.* 1.—*E. G. T., Exr.*



Complainant's Exhibit Sprague No. 1.—E. G. T., Exr.

Copy editorial from United States Democrat of January 20th, 1858.

MR. A. R. DUNTON.

If we should assert that Mr. A. R. Dunton is the most renowned penman in the country, we should only say what everybody knows and acknowledges to be true. The grace, skill, and ease with which he manages a pen, the artistical exactness with which he cuts the most difficult characters, the nice and discriminating taste which he exercises in relation to chirographical matters, are too well known to need the attestation of any one.

And if Mr. Dunton excels all other men in the art to which he devotes himself, Mrs. Dunton, his lady, likewise excels, it is said, in the same art all other ladies. No matter what the style may be, whether bold, heavy, rapid, off-hand or back-hand, ornamental or plain, she is unrivaled by any of her sex.

267 To the accomplishments which we have thus briefly noticed, Mr. and Mrs. Dunton add all the qualities which are requisite to success in teaching.

It is allowed that they cannot be surpassed in the country.

We are happy to say that they intend to open a school in this city, at Phenix Hall, Thursday evening, and will give a course of twelve lessons at a very low price.

As it is probably the only chance under so distinguished teachers, all should attend.

Complainant's Exhibit Sprague No. 2.—E. G. T., Exr.

Copy of editorial from the United States Democrat, January 27, 1858.

DUNTON'S WRITING-SCHOOL.

We briefly called the attention of our readers, last week, to the fact that Mr. and Mrs. A. R. Dunton were in town, and proposed opening a school at Phenix Hall, at rates greatly reduced from those usually exacted.

We also mentioned the extraordinary merits of those distinguished teachers. In this we exaggerated nothing. Their peers in chirographic art are not to be found. Every State in the Union has rung with their fame, and the world's fair in London has awarded Mr. Dunton a premium.

Mr. Dunton's school in Phenix Hall is progressing finely. He has a very large number of scholars, all of whom are delighted with their teachers and mode of instruction, and are taking rapid strides in the beautiful and useful science of penmanship. They already see the advantage of taking lessons of those who are masters of their profession.

In our former notice we suggested that, in all probability, this is the last chance which our citizens can have to avail themselves of Mr. and Mrs. Dunton's superior services. It is even so; and the reasons we need not state. Will it not be prudent and wise, then, for all who

268 possibly can, to take lessons? What is the paltry sum of two dollars in comparison with an elegant style of penmanship? Phenix Hall is large, accommodations good, terms low, stationery gratis, and all who are able should improve the opportunity to become penmen.

An advertisement will be found in another column.

Complainant's Exhibit Sprague No. 3.—E. G. T., Exr.

Copy of advertisement taken from the United States Democrat, January 27, 1858.

DUNTON'S WRITING-SCHOOL.

Afternoon class for ladies.
Evening class for both ladies and gentlemen.
Scholars received any afternoon during the week.
All good, bad, or indifferent writers are invited to attend.
Terms—only $2 for twelve lessons, including stationery.
Hours of instruction, from half-past 2 to 4, afternoons; and 7 to 9, evenings.
Instruction given to select classes, or in families if desired.
Mr. and Mrs. Dunton beg leave to state that they were awarded the first premium for the best mercantile and epistolary writing at the last mechanics' fair held in the city of Boston; also at all State, city, and county fairs where specimens have been contributed for many years.

Complainant's Exhibit "Cilley No. 1."—E. G. T., S. E.

Mr. and Mrs. Dunton's writing-school, of which we made mention in our last issue, is progressing finely, the scholars being much pleased with the decided improvement already made in their chirography;
269 the classes are rapidly filling up, yet there is room for all, especially in the afternoon class for ladies, which, from the fact of its not being generally understood that there was to be such an accommodation for those who could not otherwise attend, is not so full as desirable. We doubt not that this notice of the fact that there is such a class will induce those not heretofore apprised of it to find their places in the class at once.

I hereby certify that the above, relating to the writing-school of Mr. and Mrs. Dunton, has been carefully compared with, and is a correct copy of, an article or editorial published in the Rockland Gazette, (a newspaper printed and published at Rockland, Maine,) on the twenty-eighth (28th) day of January, 1858, being in volume 13, No. 5, of said Rockland Gazette.

In testimony whereof witness my hand and seal, this seventh day of May, 1873, at Rockland, Maine.

[L. S.]

J. P. CILLEY,
Notary Public.

Complainant's Exhibit "Cilley No. 2."—E. G. T., S. E.

Mr. and Mrs. A. R. Dunton will give a course of lessons in penmanship to the citizens of Rockland, commencing Thursday, 21st inst., at Phenix Hall. A good handwriting guaranteed to all in one course of easy lessons, for the low price of $2.00.

Rockland, Jan. 21, 1858. 4 tf.

I hereby certify that the above, relating to Mr. and Mrs. A. R. Dunton, has been carefully compared with, and is a correct copy of an advertisement published in the Rockland Gazette, (a newspaper printed and published at Rockland, Maine,) on the twenty-eighth (28th)

270 day of January, 1858, being in vol. 13, No. 5, of said Rockland Gazette.

In testimony whereof witness my hand and seal, this seventh day of May, 1873, at Rockland, Maine.

[L. S.] J. P. CILLEY,
Notary Public.

Complainant's Exhibit Bradlee, No. 1.—E. G. T., Exr.

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY'S DEPARTMENT,
Boston June 27th 1873.

I hereby certify that on the eighteenth day of March, 1873, J. Walter Bradlee was appointed and commissioned, and on the twenty-second day of March, 1873, duly received the qualifying oaths thereunder, as a justice of the peace for the county of Norfolk, in the said Commonwealth, for the term of seven years from the date of said commission; and that to his acts and attestations, as such, full faith and credit are and ought to be given, in and out of court.

In testimony of which I have hereunto affixed the seal of the Commonwealth.

[L. S.] OLIVER WARNER,
Secretary of the Commonwealth.

271 *Compl'ts' Ex Hirsch No. 1.—E. G. T., Exr.*

Eagle Pencil Company's sales of rubber-headed pencils from 1863 to 1872.

	1863.	1864.	1865.	1866.	1867.	1868.	1869.	1870.	1871.	1872.
Black gilt, rubber heads	168½	360	393	421	1,056	954	854	1,726½	1,674	1,003
Office round, rubber heads	.....	.....	.....	.....	.....	281	1,427	6,253	10,829	11,410
Office octagon, rubber heads	.....	.....	.....	.....	.....	.....	.....	192	1,909	1,925
Hexagon, gilt, rubber heads	.....	.....	.....	.....	.....	.....	.....	156	783½	580
Total	168½	360	393	421	1,056	1,235	2,281	8,327½	15,195½	14,918
Dozens	2,016	4,320	4,716	5,052	12,672	14,820	27,372	99,924	182,340	179,016
Pieces	24,192	51,840	56,592	60,624	152,064	177,840	328,464	1,199,088	2,188,080	2,148,192

272 *Complainant's Exhibit Hirsch No. 7.—E. G. T., Exr.*

WASHINGTON, D. C., 18*th Jan.*, 1862.

J. Hirsch to F. Tenney & Co., Dr.

Board	$17 50
E. Bck	50
	$18 00

Received payment,

FRENCH.

Complainant's Exhibit Y.—E. G. T., Exr.

The U. S. Patent-Office, to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files and records of this Office of the specification, petition, oath, and drawing in

the matter of the letters-patent granted Joseph Reckendorfer, dated November 4th, 1862, No. 36854, for "improved pencil."

In testimony whereof I, M. D. Leggett, Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed, this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

[L. S.] M. D. LEGGETT,
Commissioner.

273 Joseph Reckendorfer, of New York, N. Y. Letters-patent, No. 36854, dated Nov. 4, 1862.

To all whom it may concern:

Be it known that I, Joseph Reckendorfer, of New York, in the county and State of New York, have invented a certain new and improved pencil, whereof the following is a full and exact description, which I have prepared for the purpose of obtaining letters-patent therefor:

My invention relates to wood-encased pencils, in which the black lead or other marking material is employed in a portion of the length at one end, and India rubber, or other erasive material, is employed in another portion of the length at the other end.

The nature of my invention consists in making the exterior or wood of such pencil larger at one end than at the other, and of a form tapering for the whole or a portion of the distance, with an eraser fitted within the larger end, as shown in the drawings. This allows the eraser to be larger than is necessary for the lead to be, without too much weakening the wood, and without making the pencil cumbrous or inconvenient.

In the drawings, Fig. 1 is a side view; Fig. 2, a longitudinal section; Fig. 3, a cross-section on the line S S; and Fig. 4, a cross-section on the Z Z.

A is the wood casing of the pencil made in two parts, and glued together in the ordinary manner, but made larger at one end than at the other as represented. This casing is grooved out with a small groove for the reception of the black lead or plumbago, B, as usual, but for only a portion of its length. The remainder, at the larger end, has a much larger groove, which is filled for nearly or quite its whole extent with India rubber, C, as represented. Pencils of equal size throughout have been heretofore made with a slip of rubber fitted in in place
274 of the lead at one end, but such pencils have not become of any considerable practical importance, in consequence of the smallness of the rubber; and it has been held impractical to make the rubber much larger without too much weakening the wood, or making the entire pencil thick and awkward to handle.

By my invention, the size of the rubber may be so increased, while that of the lead remains the same, as to render it a very convenient and effective eraser. In preparing the wood portions of my pencils, I first saw the material into tapering slips, lying alternately with the ends in opposite directions, and afterwards reduce these pieces to the required form, thus economizing material as far as possible. I make the exterior of my improved pencil of a round, square, hexagonal, octagonal, oval, or other section, as may be desired, and finish it in any style, but always make the end which contains the rubber of a larger diameter than the opposite end, and tapering gradually. The lead and rubber may also be of any desired section, and may be also tapered, if

preferred, but the rubber should always be the larger, and I prefer the uniform section of each as represented.

Any other erasive material may be substituted for the rubber C, without affecting the character of my invention; or a crayon or lead of a different color or quality may be substituted therefor, if desired. Crayons and the softer qualities of lead require a larger section than that given to the part B, and the tapering form of the casing A possesses the same advantages for their employment in combination with the lead B as for the rubber.

I do not claim the combination of India rubber and black lead in the same wood case; but

What I do claim as my invention, and desire to secure by letters-patent, is:

The wooden case A, of tapering form, in combination with the rubber C, of larger section, and the black lead B, of smaller section, arranged therein substantially as and for the purpose herein described.

275 In testimony whereof I have hereunto set my name, in presence of two subscribing witnesses.

JOSEPH RECKENDORFER.

Witnesses:
THOMAS D. STETSON,
JUAN PATTISON.
Ex'd. S. M. E.

Petition B.

To the Commissioner of Patents:

The petition of Joseph Reckendorfer, of New York, in the county of New York, and State of New York, respectfully represents:

That your petitioner has invented a certain improvement in pencils, which invention he sincerely believes may be employed to the public advantage, and which has not, according to the best of his knowledge and belief, been known or used before his discovery thereof.

He has, therefore, described and defined the said invention in the specification hereto annexed, and prays that letters-patent of the United States may be granted to him therefor, according to the terms and conditions of the statutes in that case made and provided.

JOS. RECKENDORFER.

Oath.

COUNTY OF NEW YORK,
State of New York, ss:

I, Joseph Reckendorfer, do solemnly declare and depose that I verily believe that I am the original and first inventor of the improved pencil claimed by me in the specification hereto annexed; that I do not know or believe that the said invention was ever known or used be-

276 fore it was invented by me, and that I am a citizen of the United States.

JOS. RECKENDORFER.

Subscribed and sworn before me this 28th day of June, 1862.

EDWARD BROWNE,
Comr. of Deeds.

Ex'd. S. W. E.

Complts. Ex. Curtis No. 1, E. G. T., Exr.

2 p. m.—Stephen Thacher & Co., attorneys at law, Boston, Mass.: I find it was 1857 that Thomas taught with me in this vicinity.

A. R. DUNTON.

Collect 15.—K. C.

Complainant's Ex. No. 1, E. G. T., Exr.

Nov. 13, '72.

No Faber's pencil's are of my manufacture unless stamped A. W. Faber, and counter-stamped E. Faber, 133 William st., N. Y.

NEW YORK, *May* 28, 1872.

Mr. E. S. Dryden bought of Everhard Faber, 133 William street, sole agent for A. W. Faber's lead-pencils.

Terms, nett, cash in.

Sent.				
2 gross	round gilt—2	5.50	11 00
2 "	A. W. F., conic inserted	8.00	16 00
2 "	union, do	6.00	12 00
1 "	R. T. P. Co., E		3 50
5 "	steamboat blk. pold	1.35	6 75
			$49 25
	5 per cent. special		2 46
			$46 79

Paid—E. Faber.—W. H. P.

277 At a special term of the United States circuit court for the southern district of New York, held at the United States court-house, in the city of New York, on the 13th day of October, A. D. 1873.

Present, Hon. Samuel Blatchford, judge.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

The complainant in this cause having moved this court for leave to take further testimony in answer to new matter contained in defendant's rebutting testimony, and said motion coming on to be heard, and on reading and filing the affidavits of Charles F. Blake, Phillips Abbott, and John S. Washburn, and on the pleadings and proceedings herein, and, after hearing Mr. Blake and Mr. Wetmore in support of said motion and Mr. Washburn in opposition thereto, it is hereby ordered that the complainants have two weeks from Monday, the 27th day of October, 1873, in which to take evidence in reply to new matter introduced by the defendant in his rebutting evidence, heretofore taken; and that the defendant have two weeks, after the expiration of the two weeks hereby allowed to the complainant, within which to take evidence in reply to any new matter which the complainant may hereafter introduce.

KENNETH G. WHITE, *Clerk.*

278 Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Testimony taken on behalf of the complainant, before F. Dodge, special examiner, at Camden, Me., Oct. 30th, 1873, and afterward, by adjournment, at Boston, Mass., Oct. 31st, 1873.

E. Wetmore, esq., appearing for complainant; P. Thacher, esq., and John J. Washburn, esq., for defendant.

Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of RACHEL B. THOMAS, taken on behalf of the complainant, at Camden, Maine, October 30th, 1873, A. D., before F. Dodge, special examiner.

Direct interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Q. 1. Please state your name and residence.

A. Rachel B. Thomas, Camden, Maine.

279 Q. 2. You are the same lady who previously testified in this case at Boston?

A. I am.

Q. 3. You remember the visit of Mr. A. R. Dunton to your house in Camden, last February, when you found and gave him the pencil with rubber in the end, already mentioned in your testimony?

(Defendant objects to the interrogatory, as not calling for testimony which complainant has a right to introduce under the order of court, not being in reply to new matter introduced by the defendant in his rebutting evidence, and as irrelevant and immaterial.)

A. Yes, sir.

Q. 4. What days of the week did he arrive and go away?

(Same objection.)

A. He arrived Saturday and left Tuesday.

Q. 5. Which of the days was it, during his stay, that you found and gave to him the pencil?

(Same objection.)

A. Monday—Monday evening I gave it to him.

Q. 6. Was there anybody present when you found it?

(Same objection.)

A. There was not.

Q. 7. Do you remember when Mr. Dunton first asked you to look for it, or spoke of it at all on that visit?

(Same objection.)

A. I think it was Monday forenoon, but I cannot be positive whether it was in the forenoon or after dinner.

Q. 8. Were you subpœnaed here to testify to-day?

(Same objection.)

A. I was.

Cross-interrogatories proposed de bene esse by P. Thacher,
280 esq., for defendant, and answers of witness thereto:

X Q. 1. Will you please look at that diagram, Mrs. Thomas, and state whether it is a substantially correct representation of the ground-floor of your house?

(The diagram here shown witness is marked, and identified by the magistrate, "Defendant's Exhibit Y Y., F. D.")

A. Yes, sir; it is, I suppose, as correct as it can be.

X Q. 2. How many nights did Mr. Dunton sleep at your house, at the time referred to?

A. Three nights.

X Q. 3. State what they were.

A. Saturday, Sunday, and Monday nights.

X Q. 4. Please state where he slept.

A. Up-stairs, over the sitting-room.

X Q. 5. Was the parlor bed-room, so called, occupied those nights; and, if so, who slept there?

A. It was occupied by my son from Salem, Roscoe B. Thomas; he had slept in that bed-room all the time he was there.

X Q. 6. Do you recollect of Mr. Dunton's going to Hope on that visit; and, if so, on what day did he go?

A. Tuesday morning.

X Q. 7. At what time did he get back to your house after his trip to Hope?

A. I think it was about three o'clock when he got back.

X Q. 8. What time did he leave Camden that night, and how?

A. He left in time to take the boat at the usual time, four or five o'clock; it was past four. I think he went direct to the boat.

X Q. 9. At what hour, or about what hour, did he retire to bed on Saturday night?

A. Well, I should say half past nine or ten. I don't usually sit up later than that.

X Q. 10. Did he not dine out, and was he not out most of the day on Sunday?

281 A. He was out; but I can't say whether he left in the forenoon, or was gone to dinner. He was gone in the afternoon, I know, and came back before dark.

X Q. 11. Did he not go out soon after breakfast on Monday? Did he not dine out, and was he not gone all day?

A. No, sir; he was not. He went down soon after breakfast, and came back to dinner.

X Q. 12. Was he not out most or all of the afternoon?

A. He was.

X Q. 13. What day was it that he dined with his nephew, Aubrey?

A. I do not know. It might have been Sunday, because we don't get but two meals Sunday, and if he dined with him at all, it was Sunday. I don't know that he did.

X Q. 14. Have you not, during this summer, used language in substance this: "I will never deny that I gave Mr. Dunton the eraser Saturday night?"

A. Not to my knowledge.

X Q. 15. Have you not, this summer, made this statement, in words or substance: "I have become convinced that I found and gave to Mr. Dunton the pencil-eraser on Saturday?"

A. I have, to this effect: Mr. Dunton wrote a few lines with a pencil and brought it to me, stating that it was Saturday night I gave him the

pencil. I thought of some circumstances then, and told him I thought it was Monday night. He told me, no, it was Saturday night; and I finally signed the paper, and he carried it to Mr. Thacher. The next day he came in and said, "You and Sarah were right, it was Monday night;" and he said he would go to Mr. Thacher and correct it.

(Defendant objects to so much of the above answer as is irresponsive to the interrogatory, and to volunteer statements by the witness.)

(Question repeated. Complainant objects that the question has already been *already* directly answered.)

282 A. Well, I can't answer any other way than I have done. I've told it just as near as I can.

X Q. 16. Have you not, this summer, said that, if called by the other side, that is to say the complainant in this case, to testify as to the time when you found and gave the pencil-eraser to Mr. Dunton, you should answer that you couldn't remember when you gave it to him?

A. Not to my knowledge. I don't know that I ever said it.

X Q. 17. Have you not, at some time this season, used these words, or these words in substance: "Sarah won't allow me to say that I found and gave Mr. Dunton the pencil on Saturday?"

A. No, sir; I never said it.

Additional direct interrogatories by Mr. Wetmore, for complainant, and answers of witness thereto:

Q. 9. Were any of the doors leading from any of the rooms shown upon the diagram (Exhibit Y Y, to the others kept locked during Mr. Dunton's visit in February?

(Same objection as to Q. 8.)

A. There was not, not a lock on the doors.

Q. 11. When was it that Mr. Dunton brought you the paper you have mentioned that you signed?

(Same objection.)

A. I cannot say what time it was; Mr. Thacher knows what time he was down here. It was one of those days. I think it must have been before the month of September.

Q. 11. Was any other paper in relation to the day when the pencil was found, stating in effect that it was found Saturday, presented for your signature after you signed the one you have mentioned; and if so, did you or not sign the second one?

(Same objection; also because no foundation has been laid for any secondary evidence of the contents, or supposed contents, of the paper.)

283 A. I did not sign any one. I don't know as I exactly understand that. Presented by whom? (Question repeated.) I think that Mr. Thacher's son wrote a statement there to our house, and asked me to put my name to it; and I told him no; that I wouldn't sign anything more.

Additional cross-interrogatories by Mr. Thacher, for defendant, and answers of the witness thereto:

X Q. 18. Do you mean to state positively, Mrs. Thomas, that you recollect that Mr. Thacher, junior, ever asked you to sign any paper?

A. I do.

RACHEL B. THOMAS.

Subscribed and sworn before me, Camden, Me., October 30th, 1873.

F. DODGE, *Examiner.*

Defendant gives notice upon the record that he will move to strike

out the whole of the above deposition as not admissible under the order of court of October 13th, 1873, because it is not evidence in reply to new matter introduced by the defendant in his rebutting testimony heretofore taken.

F. DODGE, *Examiner.*

CAMDEN, *Oct.* 30, 1873.

At this point, October 30th, at 10.30 a. m., an adjournment was taken, by consent, until to-morrow, October 31st, 1873, at 10 a. m., at the Parker House, in Boston, Mass.

284 Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of MATTHEW JOHNSON, Jr., taken on behalf of the complainant, at Boston, Mass., October 31st, 1873, before F. Dodge, special examiner.

Direct interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Q. 1. Please state your name, age, residence, and business.

A. Matthew Johnson, jr.; age, 24; residence, Chelsea, Mass. I am a clerk in the employ of Henry A. Cook, express agent, 34 Court Square.

Q. 2. How long have you been in Mr. Cook's employ as such clerk?

A. About ten years.

Q. 3. Please state whether or not you remember the receipt, by Mr. Cook, during February last, of a box or package marked "S. C. Thomas;" and, if so, please state, if you know, when it was received, from whom it was received, and what was done with it; and if you have any entry in relation to the box, will you please produce the same, and state when and by whom it was made?

(Objected to as not in rebuttal of new matter introduced by defendant, and not within the order under which this testimony is being taken.)

A. I do not remember the receipt, but have an entry in my handwriting from the Eastern Express Company, on the morning of February 19, 1873. (Entry objected to as incompetent.) "Bx. Eastern Ex. Co., S. C. Thomas, E. Boston, 50," is the way the entry reads.

285 Q. 4. Will you please produce the book in which the entry which you have just read is contained, and state what book it is?

(Same objection as to last interrogatory, and also as incompetent, irrelevant, and immaterial.)

A. This is the book, sir, called either a ledger or day-book; it is used for entering freight from the different companies for the different towns we express packages to. It belongs to Mr. Cook's express business.

(Book here produced by the witness, and the words quoted in answer to interrogatory 3, above, are hereby certified to be a correct copy of said entry.)

(Same objections.)

Q. 5. What do the words "Eastern Ex. Co." indicate in this entry?

(Same objections.)

A. I do not know. That is the name they go by. Whatever companies we receive freight from, we generally put down on the entry so as to know who we receive freight from.

Q. 6. Then what does "Eastern Ex. Co." mean in this entry?
(Same objections.)
A. It means that we receive this package from them.
Q. 7. And what do the words "E. Boston" mean in the entry?
(Same objections.)
A. It means East Boston.
Q. 8. Does it indicate anything in regard to the place or the express company to which the package was to be delivered?
(Same objections, and as leading.)
A. The town East Boston. The address on the box; that we should send it to East Boston by that address.
286 Q. 9. And please state in regard to the figures 50 entered at the end of the entry, what those figures are intended to show?
(Same objection except as to form.)
A. Fifty cents, which we pay to the Eastern Express Company for expressing.
Q. 10. You state that you do not personally remember the receipt of the box to which the entry you have produced refers; please state what doubt, if any, you have that a box was actually received and delivered as indicated in your entry?
(Same objection, and also as calling for mere suppositions, opinions, and inferences, and thus specially incompetent and inadmissible; and also as to the form of the question.)
A. I do not personally remember. No doubt because we never receipt for goods unless we actually receive them.
(Objected to as not responsive.)
Q. 11. What does the check opposite the figures "50" in the entry indicate?
(Same objection.)
A. Checking off the package to show that the expressman has received it from us.
Q. 12. What doubt, if any, have you that the package was actually received from your concern, as indicated by the check?
(Same objection as to question 10.)
A. No doubt.
Q. 13. Does the book which you produce contain the entries of all the freight received and delivered by Mr. Cook in the month of February last?
(Same objection as to questions 3d and 4th.)
287 A. All but one day—February 1st. I have here the book containing the entries for February 1st.
Q. 14. Please state whether or not you find an entry in those books of the receipt or delivery by your concern of any other box or package directed to S. C. Thomas, East Boston, or S. C. Thomas, without other designation, during the month of February last, and if you have not already examined the books, so as to enable you to answer the question, will you please examine them now?
(Same objections.)
A. I do not find any other but this one box, received the 19th day of February.

Cross-interrogatories proposed de bene by John S. Washburn, esq., for defendant, and answers of the witness thereto:

X Q. 1. The date "February 19th, 1873," then, indicates the day upon which you received the box from the Eastern Express Company, does it not?

A. It does.

X Q. 2. February 19th, then, 1873, is the first date which appears upon your books in reference to that box?

A. It is.

X Q. 3. Is there any entry in your books referring to its delivery by you?

A. Only to the East Boston Express Company.

X Q. 4. When does it appear to have been delivered to the East Boston Express Company, and how does it so appear?

A. February 19th, 1873, the same date it was received. They make two trips daily to East Boston—morning and afternoon. We also have a settlement with them twice a day, at the time they make each trip, and the freight is checked off to them. It appears, from the check-mark on that entry opposite the figures 50, that it was delivered to them. That is all I know about it. I have no recollection about it—no personal recollection.

X Q. 5. Have you any personal knowledge when that check-mark was made, or who made it?

288 A. I have not; but suppose it was made—(objected to as not responsive, and supposition)—on the same date, February 19th, 1873.

X Q. 6. Is there anything in your books which shows it was, in fact, made on that same date?

A. Nothing but the date at the head of the page.

X Q. 7. That date was entered, was it not, before or at the commencement of that day, and prior to the receipt of the box?

A. That date at the top of the page was made after the entry of the box, because those dates are made in the evening when the books are settled. The dates "19" on the preceding page, in the margin, were made before the receipt of the box.

X Q. 8. What does "19" refer to?

A. 19th day of February.

X Q. 9. Then the entries of the receipts on the 19th of February, 1873, commenced on the preceding page at the first entry of 19, and are continued on the page upon which the entry in question appears?

A. Yes, sir.

X Q. 10. Said box was, of course, delivered at some time after the said entry of its receipt was made, was it not?

A. Yes, sir; at some time after.

X Q. 11. Does the book show at what time after it was, in fact, delivered?

A. They are in the East Boston Express Company's hands, or rather they are responsible for them after they are receipted for.

X Q 12. What do you mean by your last answer?

A. We act as their agents. They are responsible for what goods we received there from the time we receive them.

X Q. 13. I am asking you about an actual delivery by you to the East Boston Express Company, and if your books show when you made that actual delivery. Are you able to answer?

289 A. The goods are delivered to them when receipted for by us. (Question repeated.) It does not; only the date of the receipt. That is the nearest we can get to it.

M. JOHNSON, JR.

Subscribed and sworn to before me, Boston, Oct. 31, 1873.

F. DODGE,
Examiner.

Same notice as to striking out here given by defendant as in deposition of Mrs. Thomas, above.

Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of D. H. HOLBROOK, taken on behalf of the complainant, at Boston, Mass., October 31st, 1873, before F. Dodge, special examiner.

Direct interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Q. 1. Please state your name, residence, and business?

A. D. H. Holbrook; 157 Webster street, East Boston; expressman.

Q. Do you know the East Boston Express Company? If so, please state who compose that company, and where their places of business are.

(Objected to as not in rebuttal or within the order under which this testimony is being taken; also as irrelevant and immaterial.)

A. I do know the company. It is composed of Mr. George Coolidge, myself, and my brother. In Boston we have 8 and 10 Court
290 Square, 32, 34, and 36 Court Square, 34 Washington street, and 5 Broad street. In East Boston, 201 Sumner street, and branch office 201 Meridian street.

Q. 3. How long has your company been in operation?

(Same objections.)

A. Three years the first of September, 1873.

Q. 4. During February last was there any other express company having an office in East Boston, so far as you know?

(Same objections.)

A. Not to my knowledge.

Q. 5. Do you remember a receipt by your company of any box or package addressed "S. C. Thomas, East Boston," during the month of February last; and, if so, please state when and from whom it was received?

(Same objections.)

A. I remember receiving it, and it came through to us from our agents at 34 Court Square. There are three of them there, and they sign for it instead of us. Cook & Co. is the name of the concern, I think—Mr. Cook's express agency.

Q. 6. Did you receive the box from Cook's express agency personally?

(Same objections.)

A. I did, sir.

Q. 7. Did you make an entry of it at the time?

(Same objections.)

A. I did.

Q. 8. Will you please produce the book in which you made the entry, and read the entry as you find it, including the date?

(Same objections, and also as incompetent, irrelevant, and immaterial.)

291 A. This is the book; "Wednesday, Feb. 19th, 1873. S. C. Thomas, bx., ex." That is what we call fifty cents expense.

Book produced, examined by magistrate, and the above is hereby certified as a correct copy of said entry.

(Same objections.)

Q. 9. In whose handwriting is that entry?

A. In mine—D. H. Holbrook's.

Q. 10. On what day did you make the entry?

(Same objections.)

A. Wednesday, February 19th, 1873.

Q. 11. For what was the book used in which you made the entry, and where was it kept or carried at the time the entry was made?

(Same objections.)

A. For a day-book. Carried in my pocket—pants pocket.

Q. 12. Did you pay anything, and if so, what, when you got the box?

(Same objections.)

A. I paid half a dollar expenses to the Eastern Express Co., for carrying the box from wherever they took it from.

Q. 13. Do you know what is the general route over which the Eastern Express Co. carry packages?

(Same objections, and as incompetent.)

A. Well, over the Eastern Railroad, and the steamboats also between here and the State of Maine and St. John's.

Q. 14. Please state what you did with the box after you got it.

(Same objections.)

292 A. I carried it to East Boston and turned it over to my brother for delivery. That was on Wednesday, February 19th, 1873. My brother's name is John T. Holbrook, already mentioned by me as partner in the East Boston Express Co.

Q. 15. Did you receive any other box or package for S. C. Thomas during the month of February, 1873?

(Same objections.)

A. I couldn't tell you, sir, unless I referred to my books.

Q. 16. Have you any recollection of receiving any other during that month?

(Same objections.)

A. I have not.

No cross-examination.

D. H. HOLBROOK.

Sworn to and subscribed before me Oct. 31st, 1873.

F. DODGE,
Examiner.

Same notice as to striking out as in the two depositions immediately preceding.

Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of John T. Holbrook, taken on behalf of the complainant, at Boston, Mass., Oct. 31st, 1873, before F. Dodge, special examiner.

293 Direct interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Q. 1. Please state your name, residence, and business.

A. John T. Holbrook; East Boston; am an expressman.

Q. 2. Are you the brother of Mr. D. H. Holbrook, the last witness, and are you one of the East Boston Express Co.?

A. Yes, sir.

Q. 3. Do you remember the receipt by you of any box or package marked S. C. Thomas, East Boston, during the month of February, 1873? If so, please state when and from whom you received it.

(Objected to as not in rebuttal of new matter introduced by defendant, and not within the order under which this testimony is being taken.)

A. I do recollect the box. Well, I received it from my brother, D. H. Holbrook, and delivered it in East Boston. I should have to refer to my books for dates.

(Same objections.)

Q. 4. Where were you when you received it?

A. At our office, 201 Sumner street, East Boston—that is when I received it from him.

Q. 5. Did you make any entry of the receipt?

(Same objections.)

A. I did.

Q. 6. Please produce the book in which such entry was made, and read the entry to the magistrate.

(Same objections, and also as incompetent, irrelevant, and immaterial.)

A. That is the book: "S. C. Thomas, bx., 50 ex."

(Book produced by witness. The above is hereby certified to be a correct copy of the entry referred to.)

294 Q. 7. Is the entry in your handwriting?

(Same objections.)

A. Yes, sir.

Q. 8. What is the date of the entry?

(Same objections.)

A. February 19, 1873.

Q. 9. What day was the box received by you?

(Same objections.)

A. The same day.

Q. 10. Did you make any other entry in regard to that box in any other book than the one you have produced; and if so, will you please produce such book and read such entry?

(Same objections, and as incompetent and irrelevant and immaterial.)

A. I did, in the book I now have: "15th. Box, S. C. Thomas, 50, 75."

(Book produced and entry read by witness. The above hereby certified as a correct copy of entry.)

Q. 11. For what was the book used from which you first read the entry of the receipt of the box?

(Same objections.)

A. I call it the day-book. It is the one I carry with me in my pocket. The entries are in pencil.

Q. 12. And for what do you use the second book which you produce, and referred to in your answer to the tenth interrogatory?

(Same objections.)

A. It is for noting work that we both do—my brother and myself. It is the company book—a kind of ledger.

Q. 13. In whose handwriting is the entry in the book last referred to?

(Same objections.)

295 A. In my own.

Q. 14. How long did the box remain in your possession after you received it?

(Same objections.)

A. I should judge about a week from that notice that some of you have; it laid about a week, and was delivered after that; it laid from the 19th to the 25th.

Q. 15. Why was it not delivered the day it was received?

(Same objections.)

A. There was no directions on the box, and we couldn't find the owner; I mean no street and number.

Q. 16. Please state what you next did about the box, after you received it, and found no street or number marked on it, and couldn't find the owner.

(Same objections.)

A. I sent a letter, directed as the box was, by mail.

Q. 17. Please look at the letter or notice here shown you, and state whether or not that is the letter to which you refer, and in whose handwriting said letter is.

(Same objections.)

A. This is the one I refer to, and it is in my own handwriting, with one exception. I sent the notice, "80 cents," and it was afterwards changed to "$1.80" by some person unknown to me.

Q. 18. What was the date when you sent the notice?

(Same objections.)

A. February 25th.

The paper previously marked for identification in the second deposition of A. R. Dunton is here offered in evidence, and is further marked as complainant's Exhibit Holbrook No. 1, F. D., Oct. 31, 1873.

(Same objections.)

296 Q. 19. Please explain how that charge of eighty cents is made up.

(Same objections.)

A. Fifty cents of it was expenses that we paid on the box, and twenty-five cents would be the regular price for carrying it to East Boston, but when we send a notice we sometimes charge five cents extra; that was the case in this instance.

Q. 20. About how long after the notice was the box actually delivered?

Same objections.)

A. I can't say positive, but I think it was the day following.

Q. 21. Does the second book, in the nature of a ledger, contain entries of all the freight received and delivered by the East Boston Express Company in East Boston, during the month of February, 1873?

(Same objections.)

A. It is intended to; it does so as far as I know.

Q. 22. Is there an entry in that book of the receipt or delivery of any other box or package for or to S. C. Thomas, East Boston, during the month of February, 1873, except the entry you have already mentioned, or have you any recollection of having received or delivered any such box or package except the one referred to in that entry?

(Same objections.)

A. I couldn't answer that question positive without looking at that, because I am quite positive there was a package that came afterwards from New York for him. In March or April, I should say that was. I am quite sure it was some time after the first one. [Witness

297 examines book.] No, there was none in February; I have examined the book.

No cross-examination.

JOHN T. HOLBROOK.

Subscribed and sworn to before me, Boston, October 31st, 1873.

F. DODGE,
Examiner.

Reckendorfer v. Faber, marked and identified, F. Dodge, ex'r, Boston, Sept. 20, 1873.

Complainant's Exhibit Holbrook No. 1, F. D., Oct. 31, 1873.

EAST BOSTON EXPRESS COMPANY,
No. 201 Sumner St., East Boston.

Mr. S. C. THOMAS:

There is a package at our office directed to you. Please send this as order for the same.

Yours, &c.,

EAST BOSTON EXPRESS CO.

Feb. 25., 1873—charge, $1.80.

Same notice as to striking out here given by defendant, as in depositions of the three last witnesses.

Circuit court of the United States, southern district of New York.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

I, Frederick Dodge, a notary public in and for the State of
298 Massachusetts, county of Suffolk, duly appointed and qualified, and having been appointed by said court a special examiner to take testimony in said case, in the districts of Maine and Massachusetts, do hereby certify that on the 30th day of October, at Camden, Maine, and afterwards, by adjournment, on the 31st day of October, at Boston, Massachusetts, I was attended by Rachel B. Thomas and by Matthew Johnson, jr., D. H. Holbrook, and John T. Holbrook, as more particularly in their depositions above appears, witnesses on behalf of the complainant in the above action, and by Messrs. E. Wetmore, counsel for said complainant, and P. Thacher and John S. Washburn, counsel for said defendant, and the said witnesses being of sound mind and lawful age, having been by me carefully examined, cautioned, and sworn to testify the whole truth relative to the issue in said cause, gave the foregoing depositions in answer to interrogatories and cross-interrogatories proposed by the counsel above named, respectively; and the testimony given by them was by me reduced to writing in presence of the deponents, and they each afterwards subscribed the same in my presence and for their depositions.

I further certify that I am not of counsel or attorney for either of said parties, nor in any manner interested in the result of said suit.

Witness my hand and notarial seal, at said Boston, this thirty-first day of October, A. D. 1873.

[SEAL.]

FREDERICK DODGE,
Notary Public and Special Examiner.

It is agreed by said parties that the foregoing record be transmitted by me to E. G. Thompson, esq., New York, special examiner in said case, together with all exhibits therein produced; and I have transmitted the same accordingly.

F. DODGE,
Examiner.

299 RECKENDORFER
vs.
FABER.

NEW YORK, *November 4th*, 1873—11 a. m.

Present: Mr. Wetmore, of counsel for complainant, and Mr. Washburn, of counsel for defendant.

JOSEPH ILLFELDER being recalled as a witness on the part of the complainant, in answer to interrogatories propounded by Mr. Wetmore, says:

Q. 1. You are the Joseph Illfelder who previously testified in this cause?

A. Yes, sir.

Q. 2. Did Silas C. Thomas ever dine with you, or, to your knowledge, with any of complainant's counsel in this cause, either at the Parker House or anywhere else?

A. He never did, to my knowledge. The only time he ever took meals in my presence was on several occasions during the trip in which he accompanied me to Camden, in April last, as I stated before. He may have possibly taken lunch with me just before we left Boston.

Q. 3. Do you remember how long after the close of the testimony taken in this cause, at Boston, during April last, and beginning on the 8th of April, it was, that your counsel left for New York?

A. Right after the testimony was taken. I think Mr. Wetmore stayed one day longer.

Q. 4. Have you, or to your knowledge have the complainant's counsel, or any of them, or any person, by or on behalf of the complainant, directly or indirectly, ever offered Silas C. Thomas $500, or any sum, "to go on the side" of the complainant in this cause, or testify on his behalf?

A. Never.

Q. 5. I read from the testimony of Seldom D. Wiley, taken on
300 behalf of the defendant, at page 292 of defendant's printed testimony, folios 1047 and 1048. (Complainant's counsel reads passage referred to.) Did you ever hear or know of any such conversation, or of any of the matters therein stated, until you heard the said Wiley give the statement just read?

A. I never did.

Q. 6. Do you know Alden Crockett, of Rockland, Maine?

A. I do.

Q. 7. Did you hear him testify in this cause?

A. I did.

Q. 8. Did you ever tell Alden Crockett that if he would go to work for you and get testimony, that the company or the complainant, or any other person, would pay him a large, or any, price for any testimony whatever, to be used in this cause?

(Objected to as not in rebuttal.)

A. I never did.

Q. 9. Did you ever tell him that you or the company, or the complainant, or any other person, would pay him for any testimony or any service whatever, or on any account, or in any manner, the sum of one thousand dollars?

(Same objection.)

A. I never did.

Q. 10. Did he ever demand of you any sum whatever, or did you, or any one, on the complainant's behalf, ever pay him any sum whatever?

(Same objection.)

A. Never did.

Q. 11. I read from the testimony of said Crockett the whole of his evidence contained on the 340th page of defendant's printed testimony. (Counsel for complainant reads the said testimony.) Is that a correct statement of the conversation which took place between you and the said Crockett?

A. No, sir.

301 Q. 12. Please state briefly the conversation which did take place between you and the said Crockett on the occasion referred to.

A. I was told that Crockett visited the school when Dunton used to teach in Rockland.

(Objected to as not responsive and hearsay.)

I was endeavoring to find as many of Dunton's old scholars as possible (same objections) to ascertain whether they remembered having seen Dunton use any pencils with rubber in the end at any time.

(Same objections.)

Crockett told me that he used to visit Dunton's rooms frequently, and that he never saw him use such an implement; could not exactly state what date it was, but thought he was out of town when Mr. and Mrs. Dunton were teaching at Rockland; but said he knew a good many of Dunton's old scholars, and would introduce me to them; he so did at once.

(Last clause objected to as not responsive and not in rebuttal.)

All of them did not remember having seen him use such a pencil, but would not say positively whether he did or not.

(Same objections.)

I took a memorandum of their names and informed the counsel about it afterwards.

(Same objections.)

Mr. Crockett was present when I saw those men——

(Same objections.)

302 and returned with me to the hotel. I then requested him to give me information about a Memphis matter.

(Objected to as not responsive.)

After he had told me that he had seen Dunton out West, I asked him what kind of a man Dunton was. "Oh," says he, "they are all one brood. I'll shoot Seldom Dunton, his brother, at sight." This is about the whole substance of the conversation, as near as I can recollect it.

Q. 13. What conversation took place subsequently when you met Crockett in the street at Rockland, when you were accompanied by complainant's counsel?

A. We were just through taking testimony at Camden, and returned to Rockland to take the train for Boston, and I saw Mr. Crockett in the street, and introduced him to my counsel, informing them that he was the man who intends to furnish some information about Dunton's having been in Memphis in 1857, by a newspaper he had in his possession which related to that, which he thought he could find. Crockett replied that he had seen this article in the paper and might possibly be able to find it, and commenced to tell us the story of what the puff was about, when Mr. Blake whispered in my ear——

(Objected to as not responsive nor in rebuttal and as hearsay.)

"Better don't let us miss the train, as this is nothing but big blow, anyhow."

(Same objections.)

I approved of his advice, and we started for the train.

Q. 14. Did you hear the testimony of Lorenzo J. Matthews, taken on behalf of the defendant in this cause?

A. I did.

Q. 15. I read from the said Matthews' testimony an account of an alleged conversation between the said Matthews and Silas C. Thomas, pp. 360, 361 of defendant's printed evidence. (Counsel reads passage referred to.) Did you ever hear or know of any such conversa-
303 tion occurring before you heard said Matthews so testify?

(Objected to as not in rebuttal.)

A. I did not.

Q. 16. Did you, or to your knowledge the complainant, or any person in his behalf, direct, request, or authorize, directly or indirectly, Silas C. Thomas, or any other person, to offer money to, approach, or influence in any way said Lorenzo J. Matthews, or any person called as a witness by the defendant, either with a view to prevent such person testifying, or to influence their testimony in any way whatsoever?

(Same objection.)

A. Never.

Q. 17. Did you hear the testimony of Charles A. Evans, taken on the part of the defendant in this cause?

A. I did.

Q. 18. I read the answer to the 11th direct interrogatory to said Evans, on page 419 of defendant's printed testimony. (Counsel reads answer referred to.) Did you ever hear or know of any such conversation as related in the passage just read until you heard the said Evans testify thereto on the stand?

(Objected to as not in rebuttal.)

A. I never did.

Q. 19. When did the complainant's employment of Mr. Ahearne cease?

(Same objection.)

A. The date of the last item charged in his bill is June 18.

Q. 20. Did you, or to your knowledge the complainant, or any person by or on the complainant's behalf, request, direct, or authorize the detective Ahearne, or any other person, to offer the said Charles A.
304 Evans any money-consideration or inducement of any description to testify as a witness in this cause, either in relation to Dunton's character or any other fact, or for any purpose whatever?

(Same objection.)

A. I did not.

Q. 21. Did you ever hear the idea suggested from any source, prior to said Evans' testimony, that he should be called as a witness, or asked for any information on the complainant's behalf?

(Same objection.)

A. I never did.

Q. 22. In the interference case between yourself, Hovey, and others, in relation to a paper-tube pencil, did you testify in respect to any personal knowledge on your part as to the receipt in this country of the paper-tube pencils upon which the said interference was in part based, made by you in Europe?

(Objected to as not in rebuttal, as assuming what is not proved, and also as incompetent, inasmuch as the original testimony taken in that interference case is on file in the Patent-Office and accessible, and the best evidence of what this witness did testify.)

A. I did not.

Q. 23. During what period, if you know, did the Rubber-Tip Pencil Co., of which Mr. Faber was a member, hold the Lipman patent—being one of the patents in suit?

(Objected to as not in rebuttal, and also as incompetent, immaterial, and irrelevant.)

A. Up to the time it was extended, which was March 30th, 1872, if I am not mistaken.

305 And being cross-examined by Mr. Washburn says:

X Q. 24. What do you mean by "right after the testimony was taken," in your answer to the third question?

A. I mean right after Dunton's cross-examination, and Mr. Westmore, I think, left one day after that; Mr. Blake, I think, left at once.

X Q. 25. When did you leave?

A. I left about the middle of April—I think about the 18th.

X Q. 26. Were your counsel, or was either of them, present at any interview you had with S. C. Thomas, in April last, or any other time last summer, in Massachusetts?

A. Not that I remember.

X Q. 27. Was not Mr. Lincoln present at an interview you had with said Thomas, at which you were present, when you paid Thomas the twenty-five dollars for his (Thomas') statement?

A. He was not; and as I stated before, I don't know anything about the payment of $25 to Thomas, except that Mr. Lincoln has told me he has paid him this amount.

X Q. 28. Mr. Lincoln has been and is of counsel for complainant in this suit, is he not?

A. Yes; he attended to some matters in this suit, which had to be attended to in Boston.

X Q. 29. Where did you receive the statement of Thomas, as referred to by you in your previous testimony, as handed to you by Mr. Lincoln, as stated on page 234 of complainant's printed testimony?

A. At Mr. Lincoln's office in Boston.

X Q. 30. Do you mean to swear that you never had an interview with Silas C. Thomas in company with Mr. Lincoln?

A. Yes, sir.

X Q. 31. Did said Thomas ever partake of any eatables or drink anything by your or the invitation of any one else at the Parker House in Boston in your presence?

A. As I stated before, he very likely or possibly has taken lunch with me previous to our departure for Camden at the Parker House, but I remember distinctly that he never took anything to drink in my
306 presence during the whole time he was in my company; perhaps for the very reason that I never offered him any such drink.

X Q. 32. Who, if any one, was present on those occasions, beside yourself and Thomas?

A. Nobody, except the guests of the restaurant.

X Q. 33. Were you ever present at any interview with said Thomas in company with M. J. Ahearne—complainant's private detective?

A. I was.

X Q. 34. Where and when?

A. If I remember right, Ahearne informed me once that I could meet him and Thomas at Young's Hotel, in Boston. This was about the end of April last.

X Q. 35. Is that the only time?

A. The only time I remember. Still, I may be mistaken. I just come to think that Ahearne and myself went over to Thomas's house to ascertain the truth about having taught school with Dunton in 1857, and not in 1856, as fraudulently stated by him and Dunton.

X Q. 36. When was that?

A. About the same time, and previous to our going to Camden.

X Q. 37. Are those two the only occasions when you ever had an interview with said Thomas in company with said Ahearne?

A. The only two I remember.

X Q. 38. Were they before or after you received said statement of Thomas from Mr. Lincoln?

A. After.

X Q. 39. Who, if any, were present besides yourself, Ahearne, and Thomas at those or either of those interviews?

A. Nobody, I think.

X Q. 40. Was any money paid Thomas at those or either of those interviews?

A. No, sir.

X Q. 41. Was any money paid Thomas at any interview which you had in company with Ahearne with said Thomas?

A. No, sir.

307 X Q. 42. Have you stated, in your answer to the 12th question, all the conversation between yourself and Alden Crockett?

A. I have stated the whole substance of the conversation.

X Q. 43. How many different interviews and conversations did you have, in all, with said Crockett?

A. Three.

X Q. 44. Do you profess to state the whole substance of all your conversations in your said answer?

A. I profess to state the whole substance of the conversations which I had with Alden Crockett, referred to in my direct.

X Q. 45. Question repeated.

A. I mean after the testimony of Crockett has been read me by complainant's counsel, and I was asked to state the facts of those conversations, I stated the substance of all that was talked about then.

X Q. 46. Do you mean to be understood as stating that said Crockett said he had seen said Dunton in Memphis?

A. I think he first said he did, and then he said no, it was a puff he read in some newspaper, which related to his having been in Memphis.

X Q. 47. Did you not, in that conversation, talk with him about the pencil-eraser, Exhibit E, and the circumstances of its production?

A. Yes, I did; and he replied that there was not the slightest doubt but that there was some damned fraud behind it.

X Q. 48. Why did you not state that in your answer to the 12th Q., in which you have said that you had already stated the whole substance of the conversation?

A. The conversation we had lasted about half an hour, and by my former statement, mentioning that I endeavored to look up some of Dunton's old scholars to ascertain whether they had any recollection of ever having seen Dunton use any pencils with rubber in the end, I thought I had stated the whole substance.

X Q. 49. Did you not know, or were you not informed, that said Crockett had been a detective before you went to see him?

308 A. I think he told me that himself.

X Q. 50. Did you not propose to employ his services in this matter on behalf of the complainant?

A. I think I asked him to see a few parties whose names I had in my memorandum-book in regard to this pencil affair, and see what they had to say about it; and shortly afterwards—I think a half an hour after that—I returned and told him to never mind about that, that I would attend to it myself.

X Q. 51. Question repeated.

A. My above answer includes the whole proposition regarding his employ for complainant, except that I told him I wished he could find this Memphis paper for me, and he said he would.

X Q. 52. Did you have any other interview with him between that conversation and the time you met him with your lawyers?

A. No, sir.

The further cross-examination adjourned till November 5th, 1873, at 11 a. m.

NEW YORK, *November* 5, 1873—11 a. m.

Met pursuant to adjournment.

Present: Counsel for both parties.

And the witness, JOSEPH ILLFELDER, being further cross-examined by Mr. Washburn, says:

X Q. 53. 49th cross-question repeated.

A. No, sir.

X Q. 54. Did you have any other interview or interviews with him after the time you met him with your lawyers?

A. I did.

X Q. 55. How many, and where?

A. At Rockland. He called me to his office while I passed the street.

X Q. 56. In professing to state, in your answer to the 12th question, the conversation which occurred between you and the said Crock-
309 ett, do you mean to swear that what you state in that answer was all, or the substance of everything, that was said by either of you?

A. Yes, sir.

X Q. 57. Did you introduce yourself to him; and, if so, who did you tell him you were?

A. I don't know that I introduced myself to him; merely asked him if his name was Crockett.

X Q. 58. Did you mention the complainant or your company in the conversation at all?

A. I think he asked me what this suit is about, and who is connected with this suit; and I very probably told him that one Joseph Reckendorfer, who is connected with the Eagle Pencil Company, is plaintiff, and E. Faber defendant.

X Q. 59. Don't you remember whether you did or not so tell him, and what you said?

A. I could not swear positively that I did tell him that, but still I might have told him.

X Q. 60. Have your previous statements as to said conversation been likewise founded upon probability, and what might have been said?

A. No, sir. I stated what I positively remembered, and what I was capable to swear to.

X Q. 61. Why are you able to remember and to very positively swear to certain parts of the conversation and be unable to state as to other parts, except simply as a matter of probability?

A. I don't know of any parts which I stated as a matter of probability, and did not intend to state certain parts of the convers'tion, but

intended, and did state the whole substance of the conversation, as far as I could positively remember.

X Q. 62. You say, in answer to the 58th cross question, that you think he asked you what this suit is about, and who is connected with this suit, and you very probably told him; then you had, had you not, previously informed him that there was a suit pending?

A. Camden, Lincolnville, Centre, and Rockland are small places, where a stranger is easily observed. Dunton being all around those places, and actually always arriving in all of those places as soon
310 as I did, or right after I did, and talking around considerable about this pencil matter, I think introducing himself as one of the parties in this suit, the people not having much confidence in what he says, a good many people very frequently asked me, as a matter of curiosity, whether Dunton is one of the party, or who are the parties in this suit. I, of course, had no reason not to state who the parties are, and having been asked by so many, I could not swear positively whether Crockett asked me the same question or not; if he did, I, of course, informed him also who the parties were connected with this suit.

(Answer objected to as not responsive, as suppositi'ous, and an artful attempt to introduce the witness's inferences and argument in the interests of complainant, with whom he is admitted to be so closely identified, into this case)

X Q. 63. Question repeated.

A. I have answered this question before, to the effect that I may have probably told him, and my former answer is in explanation why I could not swear positively whether I did or not.

X Q. 64. Where did you so answer before; in which answer?

A. After referring to the testimony: I answered it in reply to the 58th cross-question.

X Q. 65. In that answer you stated, only as repeated in the 62d cross-question, that you think that he asked you what this suit is about, and who is connected with this suit; and you very probably told him that one Joseph Reckendorfer, who is connected with the Eagle Pencil Company, is plaintiff, and E. Faber defendant, and that is all that answer. You were asked in the 62d cross-question, referring to your answer in the 58th cross question, if you had not previously informed him that there was a suit pending. Up to the present time you have avoided answering the 62d cross-question; will you please now do so?

A. In answer to the 58th cross-question I may not have ex-
311 pressed myself correct, but still I think it is the answer in substance, which is, if Crockett asked me for the names concerned in this suit, that I told him who they were.

X Q. 66. Had you or had you not previously told him that a suit was pending? Please answer categorically, without any argument.

A. No, sir.

X Q. 67. Why didn't you answer that before?

A. Because you asked me whether I have mentioned the complainant's or the company's name to Crockett.

X Q. 68. Did you not understand the 62d cross-question which has been repeated to you so many times?

A. I answered it as I understood it.

X Q. 69. Question repeated.

A. In your 62d cross-question you refer to your 58th cross-question, and I replied to that, explaining my answer to the 58th cross-question. As to the last part of the question, I considered it answered by my answer to the 62d cross-question.

X Q. 70. Question repeated.

A. I think I understood it.

X Q. 71. Do you mean to swear that, without the fact of the existence of any suit being previously mentioned between you and Crockett, he asked you, as you think, the names of the parties? Please answer categorically.

(Objected to as assuming what is not the effect of the former statements of the witness.)

A. When I seen Crockett at the commencement of our conversation, the question whether there was a suit pending or not did not come up, as the first question which I put to him was whether he is one of Dunton's old scholars or not. The suit, or that there was a suit pending, must, of course, have been talked about by me first, if Crockett asked me for names of parties concerned in the suit.

X Q. 72. How large a place is Rockland; about how many inhabitants, according to your best knowledge and belief?

A. According to size, about five thousand; I don't think over that.

312 X Q. 73. Don't you know, or have you not heard, that it in fact contains more than double that number, and is a city of large business interest?

A. I have never questioned about it. I call it a small town, and if it appears with double the amount of inhabitants, some neighboring places must be counted in, what they call the Quarry's Village.

X Q. 74. How far is Camden from Rockland?

A. I think eight miles.

X Q. 75. How far is Lincolnville from Rockland?

A. I think about fourteen miles.

X Q. 76. Did you inform Crockett what testimony the complainant required to meet the defendant's proofs of priority?

A. I did in the way of speaking of Dunton's old scholars, and the matter connected with it, as stated in my previous answers.

X Q. 77. Did you tell him that you had employed Mr. Starrett, at Thomaston, to get evidence for you or complainant?

A. I told him that Mr. Starrett referred me to some other parties in Rockland, who may have been some of Dunton's old scholars.

X Q. 78. Did you pay said Starrett for his services in this case, or was he paid on behalf of complainant?

A. Starrett is a prominent man there, and as I had no time to attend to some matters myself, as, for instance, hunting up the newspapers, I requested him, being very well acquainted around there, to attend to it for me, and I, of course, had to pay him for his time.

X Q. 79. Is that the same O. J. Starrett whom you also procured as a witness for complainant?

A. Yes, sir.

X Q. 80. Did said Starrett refer you to said Crockett as a man who might assist you in Rockland?

A. No, sir.

X Q. 81. Do you mean to swear that the matter of your compensating said Crockett, or of his being compensated for any services he might render, was in no way referred to in your conversations by either of you?

A. I told him if by procuring this Memphis newspaper he should have any expenses or loss of time, I shall refund him such.

313 X Q. 82. Why did you not mention that in your answer to the 12th question, in which you were asked to state the conversation between you and Mr. Crockett?

A. I have mentioned this Memphis matter.

X Q. 83. Have you said anything before about your proposing to compensate said Crockett in said conversation?

A. I couldn't tell except by referring to the answer to the 12th question.

X Q. 84. Please refer to that and answer categorically, without argument or inference.

A. I did not.

X Q. 85. 82d cross-question repeated.

A. I thought I had stated it; I see just now, by referring to my answer, that I have not.

X Q. 86. Did you propose, in that conversation, to compensate said Crockett, or that he should be compensated for any services he might render in endeavoring to find old scholars of A. R. Dunton who could be procured to testify on your side?

A. No, sir.

X Q. 87. Did you propose to have him do this gratuitously?

A. He volunteered to make me acquainted with some of Dunton's old scholars, and introduce me to some of them at once.

X Q. 88. Did said Crockett give you any reason for the opinion he expressed of Seldom Dunton and the threat you say he made against him?

A. He did not, except that he said he is a miserable scoundrel.

X Q. 89. How many weeks in all, since the 10th of April last, have you spent in Camden, Maine, and vicinity?

A. About five or six weeks.

X Q. 90. How often have you called at Mrs. Rachel B. Thomas's house during that time?

(Objected to as not relating to the subject-matter of the direct examination, as immaterial and irrelevant.)

314 A. Very frequently; I don't know that I could state how many times.

X Q. 91. Have you not been in the habit, while in Camden, of calling there nearly every day?

(Same objections.)

A. No, sir.

X Q. 92. Did you know Mrs. Thomas, or any of her family, prior to her testimony and that of her son, Silas C., being taken on behalf of the defendants in this suit?

(Same objections.)

A. I did not.

X Q. 93. How long did the complainant's agent, Isaac Hirsch, remain in Boston after the testimony on behalf of defendants herein, closed in April last?

A. He left right after the testimony was closed. I think he told me he met Mr. Washburn on the train.

X Q. 94. He was there, was he not, during all the time defendant's testimony was being taken in March and April?

A. He was.

X Q. 95. Please produce the bill of Mr. Ahearne, referred to in your answer to the 19th question.

A. I have not got it with me, but can produce it before the close of this testimony.

X Q. 96. Have you received any bill since that from said Ahearne, or including any services by him?

A. I have not.

X Q. 97. Has any been received to your knowledge by any one?

A. No, sir.

X Q. 98. When was that bill received?

A. He gave it to me on the 28th of June, the date when complainant's testimony closed in Boston.

X Q. 99. Have you, or any one, on behalf of complainant, or connected with this suit, to your knowledge, had any communication since that date with said Ahearne?

(Same objection as to 90th cross-interrogatory.)

A. No, sir.

315 X Q. 100. Upon what do you found your answer to the 23d question?

A. I know that the Rubber-tip Pencil Company owned the Lipman patent up to the time of the extension.

X Q. 101. How do you know?

A. I know it because Berolzheimer, Illfelder & Co. had an exclusive license at the time the Rubber-tip Company held the patent.

X Q. 102. How does that establish it?

A. It establishes it that after the extension, or from the time it was extended, the Eagle Pencil Company had a license from Hoffman, who owned the Lipman extension then.

X Q. 103. Who did Berolzheimer, Illfelder & Co. hold their license from?

A. I don't know.

X Q. 104. How does the fact that they held a license, and that after the extension they continued to hold the license, show, or tend to show, that the Rubber-tip Pencil Company owned the patent before the extension?

A. The Rubber-tip Pencil Company was formed in 1869; Mr. Faber being president of the company, and Mr. Reckendorfer treasurer. Mr. Reckendorfer became a member of this company by assigning the Lipman patent, and other patents which he held, to the Rubber-tip Pencil Company. Mr. Reckendorfer reserved himself the right, to which Mr. Faber did not object, to manufacture the conical rubber-head pencil; and the Rubber-tip Pencil Company, it was understood at that time, will receive the Lipman patent, but has to give Mr. Reckendorfer the exclusive license of the Lipman patent.

(Answer objected to as not responsive.)

X Q. 105. Question repeated.

A. I couldn't explain it any better.

X Q. 106. Were you present when the Rubber-tip Pencil Company was formed?

A. No, sir; I was in Europe at the time.

316 X Q. 107. Were you present when any assignment of any patent was delivered by anybody to the Rubber-tip Pencil Company?

A. No, sir.

X Q. 108. When did you return from Europe?

A. In November, 1870.

X Q. 109. How long were you absent?

A. I went to Europe twice in 1869; the first time in February, the second time in June, and was absent from June, 1869, to November, 1870.

X Q. 110. Have you, then, any personal knowledge whatever that the Rubber-tip Pencil Company owned the Lipman patent up to the time of its extension?

A. I have.

X Q. 111. What?

A. By what Mr. Reckendorfer told me, and also by the contract which was made, and I read.

X Q. 112. By and between whom was that contract executed?

(Objected to as calling for secondary evidence.)

A. It was between the four members of the company.

X Q. 113. Have you, then, any knowledge on the subject excepting what you have received from the complainant, and the individual contract you refer to?

A. No, except what I stated; I may be able to procure the contract if requested.

X Q. 114. When was that contract dated?

(Same objection.)

A. 1869, I think in June.

X Q. 115. That was before the formation of the Rubber-tip Pencil Company, was it not?

A. I don't know. I left on the 8th or 16th of June, I think, for Europe, and the contract was made after I left.

X Q. 116. How does that contract, made in June, 1869, enable you to state absolutely that the Rubber-tip Pencil Company owned the Lipman patent nearly three years after?

317 A. I know that Reckendorfer was a member of that company at the time of the extension, and there was no change in the contract up to that time.

X Q. 117. Are you now able to produce, and, if so, please do so, the bill of Mr. M. J. Ahearne, to which you have referred?

A. I am, and herewith produce it. It is as follows:

"BOSTON, *June* 28, 1873.

"*Joseph Illfelder, or Eagle Pencil Co., Dr. to M. J. Ahearne.*

"To expenses incurred	$140 70
"To 50 days' labor, @ $5	250 00
	390 70
"Cr. by cash from Mr. Illfelder	110 00
"Balance	280 70

"$280 in full settlement of bill.

"Received payment,

"J. I."

("Endorsed:) 'I think this bill is a fair one.'

"ARTHUR LINCOLN.

"JUNE 27, 1873."

The following is the bill of items and of said expenses:

"BOSTON, *June* 27, 1873.

"*Joseph Illfelder, or Eagle Pencil Co., to M. J. Ahearne, Dr.*

"1873.		
"April 10.	Money paid out	$2 25
" " 11.	Supper with Mr. Illfelder	1 25
" " 24.	For pencils	4 50

" "	26.	Dinner with Mr. Illfelder	2 30
" "	26.	Paid Mr. Dervan for labor and expenses	38 65
" "	27.	Paid for horse from Salem to Boston	10 00
" "	28.	To South Boston	70
"May	23.	Team to Milton in forenoon and afternoon	12 00
" "	24.	Team to Malden	7 00
" "	24.	Dinners at Young's Hotel for three witnesses	13 85
"318	May 28.	Money paid out with Mr. Illfelder	1 60
"	" 29.	Dinner with Dr. Thomas	1 75
" "	31.	" " "	1 75
"June	6.	Carriage to E. Boston	3 50
" "	6.	Expenses at Copeland's for Dr. Thomas and wife	2 85
" "	7.	Carriage to E. Boston	3 50
" "	7.	Expenses of detective, (two days)	15 00
" "	7.	Lent Mr. Illfelder	10 00
" "	7.	Pd. car conductor	2 50
			$134 95
"Cr. by cash from Mr. Illfelder			110 00
"Balance			$24 95
"June 18 and 19. Expenses to Salem and Revere			5 75
			$30 70

"J. I."

X Q. 118. The "J. I." appearing on the above bills are your initials, and placed there by you, were they not; and what do they indicate?

(Objected to as not relating to any matter elicited by the direct examination, and as immaterial and irrelevant.)

A. They are. They indicate check for payment.

And in answer to redirect examination, the witness says as follows:

Re-D. Q. 119. You have stated in your cross-examination that you had three conversations with Crockett, the substance of two of which you have related; when did the third conversation occur?

(Objected to as re-opening the direct examination, and as introducing new matter.)

A. The first days of September last.

Re-D. Q. 120. What was the substance of that conversation?

(Same objections.)

319 A. Passing along the streets, walking, Crockett called me into his office, and said he understood that I was looking up his character. I replied, it is not so, but told him that I heard that he will testify that I offered him a thousand dollars to testify against Dunton's character, or something of that kind. He said he never said it, nor would he testify, and closed with the remark, "Of course, anybody can subpœna me; I don't know that it will be of any harm to you." This is about the substance of the conversation.

(Same objections as to answer, and objected to as not in rebuttal, or within the order under which this testimony is taken.)

Re-D. Q. 121. You mentioned, in your cross-examination, having employed the services of Mr. Starrett in this case. What was the whole amount of the money paid by you to Mr. Starrett for such employment?

A. I think about twenty-six dollars, including his expenses, which were fifteen or sixteen.

Re-D. Q. 122. Do you know the amount paid Mr. Starrett for his witness-fees, including travel and attendance?

A. I think eight dollars.

Re-D. Q. 123. Does the 26 dollars that you have mentioned include the witness-fee mentioned in your last answer?

A. Yes, sir.

Re-D. Q. 124. Excepting the Messrs. Renwick, have any other of the witnesses of the complainant in this case had any employment from the complainants?

(Objected to as not in rebuttal or within the order.)

A. Yes; Mr. J. P. Waterhouse.

Re-D. Q. 125. Please state what that employment was and what he was paid for it.

(Same objections.)

A. He went for me to Framingham, Massachusetts. I paid him, including his expenses, 10 dollars.

320 Re-D. Q. 126. Any other of the witnesses of the complainant received any employment besides those you have mentioned, and besides yourself and Mr. Hirsch?

A. No, sir.

Re-D. Q. 127. What sums of money have been paid to the complainant's witnesses for their witness-fees, including travel and attendance, stating the extreme limits of the amount paid to each one?

(Same objections.)

A. No witness received above ten dollars. Our witness from Belfast to Camden—14 miles—received, I think, 8 dollars including his expenses. Our witness from Lincolnville to Camden received three dollars. The witness from Rockland, who brought the newspapers, received five dollars, including expenses. Of our witnesses in Boston, one for attending 2 days, I think he received fifteen dollars. I do not know how much Mr. Scribner was paid—he came from Chicago to New York. I am informed by Mr. Hirsch that Scribner was paid 100 or 102 dollars, including his expenses from Chicago to New York and back again.

Re-D. Q. 128. Were any other sums of money paid, directly or indirectly, except as you have mentioned, to any of the complainant's witnesses in this cause?

A. No, sir.

The further examination of this witness suspended by consent of counsel.

CHARLES F. BLAKE, a witness called on the part of the complainant, being duly sworn, deposes and says as follows:

My name is Charles F. Blake; I am one of the solicitors and of counsel in this cause, and have been cognizant of all the proceedings herein. With the consent of my clients, I waive my privilege as counsel, and offer myself to the defendant to be cross-examined in regard to all the matters which constitute the record in this cause.

321 Defendant's counsel, having the highest respect for Mr. Blake's professional and personal character, does not wish to cross-examine him.

CHARLES F. BLAKE.

Subscribed and sworn to before me this 5th day of November, 1873.

E. G. THOMPSON,
Examiner.

EDMUND WETMORE, a witness called on the part of the complainant, being duly sworn, deposes and says as follows:

My name is Edmund Wetmore. I am one of the complainant's counsel herein, and acquainted with all the proceedings in this cause taken by him or on his behalf; and, by the consent of our clients, I herewith make the same offer which has just been made by Mr. Blake, and offer myself for cross-examination in regard to any matter or thing respecting this litigation.

Defendant's counsel in like manner declines to cross-examine Mr. Wetmore.

EDMUND WETMORE.

Subscribed and sworn to before me, this 5th November, 1873.

E. G. THOMPSON,
Examiner.

Adjourned to Thursday, November 6th, 1873, at 2 p. m.

NEW YORK, *November* 6, 1873.

Present, counsel as before.

And the witness, JOSEPH ILLFELDER, being further examined by Mr. Wetmore, says:

Re-D. Q. 129. Do you wish to correct any statement contained in your evidence yesterday? If so, please do so.

322 A. Yes, sir. I didn't state, in reference to J. P. Waterhouse, that he went to two other places for me lately. One of the places is Newburyport. The name of the other place I forgot; and I think he received as much as ten dollars in each case, including his expenses.

And in answer to recross-examination the witness says:

Re-X Q. 130. How do you know there was no change in the contract, as stated in your answer to the 116th cross-question?

A. Not to my knowledge is what I meant.

Re-X Q. 131. How, when, and from whom did you hear that Crockett would "testify that I" (you) "offered him a thousand dollars to testify against Dutton's character, or something of that kind," as stated in your answer to 120 redirect question?

A. People at the hotel—at the Bay View House, in Camden—told me about it in the end of August, and when Crockett called me to his office, and I mentioned it to him, he said he thinks another man, and mentioned the name, which, I think, was Cavern, spread the story.

Re-X Q. 132. What people told you? Give their names.

A. The clerk of the hotel. His name, I think, is Gilley, and the others I did not know. They were people from Rockland, and just stopped there to take a drink, and just mentioned it to Gilley a little before he mentioned it to me, as he told me. There was also one Mr. Johns, in Camden, mentioned it to me.

Re-X Q. 133. Was any one present, at any time during said conversation, except you and said Crockett?

A. No, sir. When we left the room, and he went out doors with me, a few came in, but they didn't hear anything of the conversation.

Re-X Q. 134. Did not Colonel Speer, the superintendent of construction of the Rockland custom-house, of which said Crockett was the clerk, come in or come to the door when you were in the room at that time with said Crockett?

A. As I mentioned before, I was just about leaving the room
323 when somebody came in. I don't know who he was. There was no conversation then. I only remember that Crockett commenced to address me again all at once, changing the topic of his conversation entirely, and saying something like, "Now, mind you, I shall whip or shoot anybody who attempts to follow up my character. My character is my own." I was just out doors at the last sentence, Crocket behind me. When I came to the stairs he mentioned to me the words which I stated before, "Anybody can subpœna me. It will be no harm to you, anyhow."

Re-X Q. 135. Was said Crockett's language to you, during that interview, angry or threatening?

A. Yes, sir; until I told him that I did not follow up his character, and informed him about a story which I had heard.

Re-X Q. 136. Did he not, then and there, insist that you had expressed yourself as willing, or that complainant was willing, to pay, or to pay him, one thousand dollars for getting testimony for you in this case, or to that effect?

A. He never did.

Re-X Q. 137. Did you seek him out after the report you say you heard from the clerk of the Bay View House, or did he himself require you to go to his office?

A. Not only that I did not seek him out when I thought he had spread the story, I tried to avoid him, and it just happened that I walked along the street in Rockland, when he crossed the street and asked if I wouldn't come up to his office for a few minutes.

Re-X Q. 138. How long was this conversation before the defendants commenced to take their testimony at Camden?

A. It was on Saturday; I think the Saturday previous.

Re-X Q. 139. When had you last seen him before?

A. In company of the counsels, when we passed through Rockland, taking the train for Boston, which was in June last, after the close of complainant's testimony in Camden.

Re-X Q. 140. Do you mean to charge that Alden Crockett committed absolute and willful perjury in testifying as he did on behalf of defendant?

324 (Objected to as calling for an opinion, and an opinion upon a question of law as to the statutory crime of perjury.)

A. He did, in my opinion, sir.

Re-X Q. 141. Were you in Boston on April 26th last?

A. I couldn't tell you that, except I refer to my former testimony, or to some memorandum I have, which I am sorry not to have with me now.

(The witness states that he wishes to refer to his former deposition before answering.

Counsel for complainant instructs the witness that he has a right so to do.)

A. After referring to my former deposition, I see I left for Camden on the 29th or 30th of April, and I think I was in Boston on April 26th.

Re-X Q. 142. Were you in Boston all the time from April the 11th to April 26?

A. No. I know I left a few days after the 16th for New York. Of course I only state this from memory.

Re-X Q. 143. How long were you absent?

(Objected to as not referring to any new matter elicited on the redirect examination from the witness.)

A. I could not go into any details of dates, except by refreshing my memory by looking at my memorandum. I have been in Boston several times. I can state I left Boston on Saturday after the 16th of April.

Re-X Q. 144. Look at your memorandum, and answer.

A. I am sorry that I haven't got it with me.

Re-X Q. 145. Were you in Boston May 24 last?

(Same objection as to 143 re-cross.)

A. I couldn't state.

Re-X Q. 146. Were you in Boston May 29 and 31st last?

(Same objection.)

325 A. I was not.

Re-X Q. 147. Were you in Boston June 6 last?

(Same objection.)

A. I was.

Re-X Q. 148. Who were the three witnesses referred to in the item of May 24th of Ahearne's bill of expenses?

(Same objection.)

A. Mr. Ahearne called them witnesses, but they were not. I know I gave him charge of the Sumner matter, and he told me he had seen a friend of his by the name of Tucker, who was in the company of two other gentlemen; and as Tucker was from Milton, the same place where Sumner resides, he invited them all for dinner, and talked mainly with Tucker to get information about Sumner.

Re-X Q. 149. Have you paid, loaned, or given, or procured to be paid, loaned, or given, or furnished in any manner, or for any purpose, directly or indirectly, any money or other thing or value, to Mrs. Sarah L. Barber, Mrs. Rachael B. Thomas, or Silas C. Thomas, or either of them?

A. Yes, sir; I gave to Mrs. Sarah L. Barber and Mrs. Rachael B. Thomas one dollar each when I subpœnaed them. I also remember that I brought them, and Mrs. Philbrooks as well, one box of candy. I never paid anything, never actually handed any money, to Silas C. Thomas, even during his trip with me to Camden. Silas C. Thomas has, to my knowledge, been paid twenty-five dollars by Arthur Lincoln, in Boston.

Re-X Q. 150. Are those all of the payments or gifts that you can now remember?

A. I think this is all; but still I know that Mr. Arthur Lincoln has paid Silas C. Thomas some other amounts on account of his bill, but I couldn't state how much it was.

Re-X Q. 151. What bill?

A. The bill which Thomas handed in to Lincoln for a number of days spent with me or Ahearne.

326 Re-X Q. 152. When did he hand it in?

A. I don't know when he handed it in, but Mr. Lincoln informed me, when in Boston last, previous to my going to Camden, about two or three weeks ago, that Thomas had handed him a bill, I think, for something like 32 days' services, at five dollars a day, which, Lincoln said, does not agree with memorandum left by me and Ahearne, and I told him not to pay it yet.

R-X Q. 153. Did that bill include any charge for alleged disbursements?

A. I didn't see the bill, but I am sure it did not, else Mr. Lincoln would have mentioned it to me.

Re-X Q. 154. Did Mr. Lincoln tell you what the whole amount of that bill was?

A. I think he did. He said, I think, 32 days—a hundred and sixty dollars.

Re-X Q. 155. Were there any credits on that bill?

A. There were not, I think, because Mr. Lincoln told me that he has paid him something from time to time, has a receipt for it, and this amount, of course, has to go off the bill.

Re-X Q. 156. Where is that bill now?

A. I think Mr. Lincoln has got it.

Re-X Q. 157. Has Mr. Lincoln made all of the payments to Silas C. Thomas that have been made in this suit, and matters connected therewith, on part of the complainant?

A. He did.

JOSEPH ILLFELDER.

Subscribed and sworn to this 6th day of November, 1873.

E. G. THOMPSON,
Examiner.

327 Circuit court of the United States for the southern district of New York.

JOHN RECKENDORFER
vs.
EBERHARD FABER.

We hereby consent that the answer of the defendant herein may be amended by inserting therein the following additional allegations, the replication already filed to stand as the replication also thereto:

"And this respondent, further answering, says that the said letters-patent, and each and every part thereof, are void and of no effect in law, because that the said alleged inventors and patentees were not, nor was either of them, the original and first inventors and discoverers of any material or substantial part of the said alleged invention or discovery and things patented; but that the same and every material and substantial part thereof had been previously known to and used by the following persons in this country; that is to say: Alvin R. Dunton, Benjamin F. Lord, Silas C. Thomas, Lavinia B. Pendleton, Octavia O. Sprague, Charles French, George A. Sawyer, Francis H. Hale, John M. Whittemore, all of Boston, in the State of Massachusetts; Charles A. Evans, of Revere, in said State of Massachusetts; Samuel W. Gushee, of Norton, in said State of Massachusetts; Rachel B. Thomas, of Camden, in the State of Maine; James Sumner, of Milton, in the State of Massachusetts.

"And this respondent, further answering, says that the letters-patent, and each and every part thereof, are void and of no effect in law, because that the said alleged inventions had been in public use or on sale in this country for more than two years prior to the said alleged inventors' and patentees' applications for said patents therefor, to wit, by Alvin R. Dunton, of Boston, in the State of Massachusetts, at said
328 Boston and in various other places in said State of Massachusetts; at the towns of Camden, Lincolnville, Hope, Rockland, Thomaston, and in various other places in the State of Maine; at various places in the State of Connecticut and elsewhere; Benjamin F. Lord, Lavinia B. Pendleton, Octavia O. Sprague, Charles French, George A. Sawyer, Francis H. Hale, John M. Whittemore, all of Boston, in the State of Massachusetts, at said Boston and elsewhere; Silas C. Thomas, of Boston, in the State of Massachusetts, at the towns of Camden, Lincolnville, Hope, Rockland, Thomaston, in the State of

Maine, and elsewhere; Charles A. Evans, of Revere, in the State of Massachusetts; Samuel W. Gushee, of Norton, in the State of Massachusetts, at Boston and elsewhere; Rachel B. Thomas, of and at Camden, in the State of Maine, and elsewhere; James Sumner, of Milton, in the State of Massachusetts, at Milton and Boston, in said State, and elsewhere.

"And this respondent, further answering, says that the said letters-patent issued to the complainant, said Joseph Reckendorfer, dated the fourth day of November, A. D. 1862, for an alleged 'improvement in pencils,' and in the bill of complaint herein alleged to have been re-issued on the first day of March, A. D. 1870, and which re-issued letters-patent are designated as re-issued No. 3863, and every part thereof, are void and of no effect in law, because that the said alleged inventor and patentee was not the original and first inventor or discoverer of any material and substantial part of the said alleged invention or discovery and thing patented; but that the same and every material and substantial part *part* thereof had been previously invented by Hymen L. Lipman, of Philadelphia, in the State of Pennsylvania, and known to and used by said Hymen L. Lipman, Joseph T. Mears, John P. Charlton, all of and at Philadelphia, in said State of Pennsylvania."

Dated May 9, 1873.

KELLER & BLAKE,
Complainant's Solicitors.
JOHN S. WASHBURN,
Defendant's Solicitor.

NEW YORK, *May* 12, 1873.

329 United States circuit court for the southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

The deposition of Lavinia B. Pendleton, taken on behalf of the defendant, before Frederic Dodge, notary public, and special examiner of said court, on Wednesday, March 5th, A. D. 1873, at Boston, in the district of Massachusetts; Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

I, LAVINIA B. PENDLETON, being duly sworn, do on oath testify as follows, in answer to the several interrogatories and cross-interrogatories proposed:

Int. 1. What is your residence?

Ans. 744 Fourth street, City Point, South Boston.

Int. 2. Are you acquainted with either of the parties to this suit?

Ans. No, I am not.

Int. 3. Are you acquainted with Alvin R. Dunton; and, if so, how long have you known him?

Ans. I am, and ever since he was a small boy.

330 Int. 4. Where did you reside in 1852?

Ans. South Boston.

Int. 5. In that year did you see said Alvin R. Dunton; and, if so, when first, and under what circumstances, and state what occurred?

Ans. In May, 1852, he called at my house. Whilst there he told us of

his being in New Orleans and of his writing there. During the conversation he said he would mark us some visiting cards if he only had the materials with him to do it. We told him my daughter Octavia O., now Mrs. Sprague, who is now present, and I, that eve, would give him some pencils and cards. He then made what he called a "style" from something he took from his vest-pocket. He then took a pencil, an old-fashioned red-cedar one, said he was going to make something to erase with. He split the pencil very easily and took out a piece of the lead. He cut a piece of rubber, a very nice piece of rubber, cut it with a sharp knife, and inserted it where he took out the lead. He then put the pencil together, but of course he could not hold it and use it. He cut a little groove around each end of the pencil, and my daughter tied it with a white thread. He then, laughing, said he'd got a pencil to suit him, one of his own make. I don't know as I can say anything more, except that I saw him use the lead of the pencil, and the rubber end to erase with.

Int. 6. Did he say anything in regard to any prior use of said pencil; and, if so, what did he say?

(Objected to by Mr. Blake as hearsay.)

Ans. I said to him, "What do you intend to do with a pencil like that?" He said it was to erase with; that he had made them in New Orleans, and knew the use of them.

Int. 7. How did he sharpen the pencil-eraser for use which he then made at your house?

Ans. With his knife, as he would a pencil. I don't suppose he cut it as fine as he would a pencil. I am not particular about that.

Int. 8. Which end of that pencil-eraser did he so sharpen?

331 Ans. Why, of course, the one he put the rubber in.

Int. 9. What was the condition of the other end?

Ans. I cannot say whether he sharpened the other end to use as a pencil or whether he took some other one that my daughter furnished him; that I am unable to say, as he used sometimes three pencils when he was drawing cards.

Int. 10. When he split open the red-cedar lead-pencil, and took out a piece of the lead and inserted in place of it a piece of India rubber, at what part of the pencil did he take out the lead and insert the rubber?

Ans. Why, at the end of it, of course; down, perhaps, an inch or an inch and a half.

Int. 11. Do you mean that the rubber extended from the end of the pencil for an inch or an inch and a half?

(Objected to as leading, and withdrawn.)

Int. 12. How long was the piece of rubber which he inserted?

Ans. It might have been an inch or an inch and a half; it is quite impossible for me to determine that.

Int. 13. When the pencil was put together again, did the rubber appear?

Ans. Certainly, a very little.

Int. 14. Where; at what part of the pencil?

Ans. Why, of course, it was put in the end of the pencil; it couldn't be anywhere else.

Int. 15. How long had it been prior to this time since you had seen Mr. Dunton?

Ans. I think it was sixteen years.

Int. 16. You have stated that your daughter tied this pencil-eraser together with thread. Did Mr. Dunton say in what manner he was accustomed to fasten the pencil together, and what did he say?

(Objected to us hearsay.)

Ans. He said he had put them together rather differently from that. I don't know as he mentioned gluing them or anything of the kind. He said he had made them rather differently from that.

Int. 17. Was your daughter Octavia present during all this interview?

Ans. She was.

332 Int. 18. How long did Mr. Dunton stay at your house then?

Ans. He passed the day and night there, and part of the next day.

Int. 19. During that time did he use, and if so how did he use, and to what extent, the pencil-eraser which you have described as so made by him?

Ans. When he made any marks that didn't exactly suit him, he erased with this rubber-pencil. I presume he didn't use it very often, as he wasn't apt to make mistakes; the eraser was what he used to erase with, and the other pencils he drew with, but he didn't want to erase very often, as his work was very delicate and fine.

Int. 20. What do you mean by the other pencils?

Ans. They were common lead-pencils.

Int. 21. Did he use the lead-pencil part of this pencil-eraser which you have described as containing rubber in one end and a pencil at the other end?

Ans. Certainly.

Int. 22. What did he draw for you, in drawing which he used both the lead and the eraser in this pencil-eraser which you have described?

Ans. A number of pretty devices—birds and foliage.

Int. 23. What did he draw them on?

Ans. Some were Bristol board, and others were enamel board. I think they were. I think there's some of the cards in the house now at home.

Int. 24. How much time did he occupy in those drawings at that visit?

Ans. Well, it's impossible to tell that; I can't tell; he didn't work steadily.

Int. 25. Did he do any part of it the next day?

Ans. He did; he finished those that he left.

Int. 26. Were you accustomed after that time to see Mr. Dunton; and, if so, how often and for how long?

Ans. Occasionally, for some three, four, or five years, and from that time to this.

Int. 27. Did you ever see him use again such a pencil-eraser as you have described?

Ans. Many times.

333 Int. 18. Where?

Ans. At my own house and in his rooms at 228 Washington st.

Int. 29. What were those rooms at 228 Washington st.?

Ans. Public-school rooms, where he used to open a large writing-school.

Int. 30. Were those pencil-erasers which you saw him use subsequently fastened with a string, as that which he made at your house in May, 1852? And if not, how were they put together?

Ans. They were not put together with a thread; they were put together in a much better manner. I never examined one afterward.

Int. 31. For how long after May, 1852, did you see him use these pencil-erasers, at different times, at your house and at 228 Washington street?

Ans. I've seen him, I presume, during 1855, 1856, and 1857, when he was drawing charts. He used a larger kind, made in a similar style, when he used to draw charts, to erase charts; it was a larger piece of rubber.

Int. 32. Did you ever see him use these pencil-erasers at any other place than your house and his rooms at 228 Washington street?

Ans. Never.

Cross-interrogatories by Mr. Wetmore and Mr. Blake on behalf of complainants and answers of the witness thereto:

Cr.-int. 1. Will you please state the names of the persons who have been present during your deposition and have heard it?

Ans. Dr. Thomas, Mr. Thacher and his son, Mr. Dunton, and Mrs. Sprague. That is all that I know.

Cr.-int. 2. Are you now married?

Ans. I have been.

Cr.-int. 3. Do you carry on any business; and, if so, what?

Ans. Not any.

Cr.-int. 4. Have you ever carried on any business; and, if so, what?

334 Ans. Never.

Cr.-int. 4½. What was your husband's business?

Ans. He was a ship-master.

Cr.-int. How long have you resided in your present residence?

Ans. Four years.

Cr.-int. 6. Where did you live before that?

Ans. I have lived in Boston thirty years; South Boston. (Question repeated.) I have lived in three different houses on Fourth street, as it is extremely long; the numbers on the streets have been changed; I couldn't state exactly; 286 was one number.

Cr.-int. 7. Where did you reside in 1852, when you saw Mr. Dunton?

Ans. On Fourth street, near Broadway; I do not remember the number; it was a house I owned at the time, and afterwards the numbers were changed, and I don't recollect.

Cr.-int. 8. How long have you known Mr. Dunton?

Ans. Ever since he was a small boy; as far back as, I think, in the year 1825; I am confident; yes, as long ago as that; I can't state how old he was at that time; twelve or thirteen, I should think.

Cr.-int. 9. Did I understand you rightly to say that you had not seen him for sixteen years prior to this visit in 1852?

Ans. I had not.

Cr.-int. 10. How do you fix the date as being May, 1852, when he came back?

Ans. Well, I think it was in conversation partly by himself and partly by my speaking of the time that had passed, and he spoke of its being sixteen years since he had seen me.

Cr.-int. 11. You mean conversation in 1852, do you?

Ans. I do.

Cr.-int. 12. Can you state any fact by which you can fix the date of this conversation with Mr. Dunton as being in 1852, in May?

335 Ans. He told me at that time that he intended to get up a series of books, writing-books, and they were published in 1852, in the same year.

Cr.-int. 13. Is that the only fact by which you fix this date?

Ans. No, it is not. I have some letters which were written at that same time.

Cr.-int. 14. When did you last see these letters?

Ans. Last Saturday.

Cr.-int. 15. How many of them are there, and who are they from?

Ans. Only one goes to fix the date, and it was from my husband.

Cr.-int. 16. What was there in those letters which fixes the date of Mr. Dunton's visit and his making this pencil?

Ans. Nothing at all.

Cr.-int. 16½. What was there in those letters which fixes the date of that visit?

Ans. That is my particular business. I shall decline to answer anything farther, as it has nothing to do with this affair.

Cr.-int. 17. Did I understand you to say that Mr. Dunton stayed a day or two with you at that visit?

Ans. He did, or a day and a night.

Cr.-int. 18. Was any one else staying with you at that time?

Ans. None except my own family and servant.

Cr.-int. 19. Of what did your family at that time consist?

Ans. Myself and eight or nine children.

Cr.-int. 20. Is Mr. Dunton a connection of yours?

Ans. He is not.

Cr.-int. 21. Were any other of your children except Miss Octavia present at this conversation you have described in regard to the pencil?

Ans. None except small ones, I presume.

Cr.-int. 22. Had you any interest in Mr. Dunton's writing-books at that time, or at any time afterwards?

Ans. Never.

Cr.-int. 23. When did you last see one?

336 Ans. I do. I can see one every day. I keep them in my house. (Question repeated.) I had one in my hand this morning, that was published in 1852.

Cr.-int. 24. What is the age of your youngest child?

Ans. Twenty-one.

Cr.-int. 25. How long is it since Dunton's writing-books have been used by your children in your family?

Ans. Always used them ever since his first series was published in 1852. They have always been in use in the common schools.

Cr.-int. 26. Please state what occurred at your house in May, 1852, when Mr. Dunton was there, besides this matter of the pencil.

Ans. I don't think I can state any circumstance definitely, anything more than common civilities and politeness which we offer to guests.

Cr.-int. 27. Where did Mr. Dunton get the rubber he used in this pencil?

Ans. My daughter gave it to him.

Cr.-int. 28. What was the color of the rubber?

Ans. This was a piece of what is called pure rubber, her father gave her, and it was quite large. It was very different from what is used now; it was pure, and of the clear rubber cast.

Cr.-int. 29. What was the shape of the piece that her father had given her?

Ans. I don't exactly recollect, although it was quite a large piece, a thick, clumsy-looking piece.

Cr.-int. 30. What shape did he cut the piece of rubber into before he put it into the pencil?

Ans. He cut off a small stripe off of the side of this piece.

Cr.-int. 31. You say that he cut small grooves around each end of the pencil. How far were these grooves from each end of the pencil?

Ans. I should think about an inch.

Cr.-int. 32. Do you remember whether the pencil was so split as to leave lead in the grooves of both parts, or in only on one side?

Ans. Recollect it on one side, of course, as he split it.

337 Cr.-int. 33. Was there a groove in each of the split pieces?

Ans. I cannot say about that.

Cr.-int. 34. Do you distinctly remember that the thread with which Miss Octavia tied the pencil was white?

Ans. Certainly it was.

Cr.-int. 35. Now can you tell us, first, who was present at this conversation?

Ans. None except myself and daughter, Miss Octavia, and the smaller children. I presume my son came home from the high school at night.

Cr.-int. 36. Was Miss Octavia your oldest daughter?

Ans. She was.

Cr.-int. 37. How old was she at that time?

Ans. I can't exactly state; she was a school-girl.

Cr.-int. 38. State as nearly as you can how old she was at that time?

Ans. She might have been seventeen or eighteen.

Cr.-int. 39. How old were the other children who were present at the time, if there were any?

Ans. They were very young children; there were so many of them I couldn't state exactly.

Cr.-int. 40. Do you remember the knife with which he cut the rubber?

Ans. Only that it was his own sharp knife, which cut the rubber very nicely; nothing more.

Cr.-int. 41. Now, do you recollect distinctly seeing him use the lead end of the pencil, in which the rubber was put, to draw with?

Ans. Why certainly he did, as he didn't disturb the lead, only the small piece that he took out.

Cr.-int. 42. Was it at this visit in May, 1852, that you saw him use it, or at some other time?

Ans. At this time that I have mentioned.

Cr.-int. 43. What did he use it on?

Ans. Cards which he was drawing for the family, myself and daughter.

Cr.-int. 44. Were these cards the usual visiting-cards in use at that time?

338 Ans. They were.

Cr.-int. 45. And they were very glossy and shiny, were they not?

Ans. Some were; the enameled cards, and some were Bristol board; both kinds he used.

Cr.-int. 46. And you remember distinctly his using this pencil end, and on these cards, do you?

Ans. Most certainly, for he made it for the purpose.

Cr.-int. 47. I do not know whether I rightly understand you. Were these visiting-cards some Bristol board and some enamel, or were the Bristol board something else than visiting-cards?

Ans. No; they were enameled visiting-cards, and I have some in the house at the present day; he used both kinds at my house.

Cr.-int. 48. After 1852 you say that you saw pencils of this structure from time to time in Mr. Dunton's possession. How long did you continue so to see them?

Ans. I can't definitely state, as I knew him to use so many different kinds of pencils, and they were of no consequence to me whatever to examine them; whenever I happened to see one of the rubber ones in use, I saw it, and thought it was his invention, and thought nothing more of it; I knew he used them constantly.

Cr.-int. 49. Of these various kinds of pencils which he used, do you remember when you first saw any one of them? If so, which, and describe the circumstances.

Ans. I can make no definite statement as to that, for his writing was so common to me that I don't recollect any particular circumstance.

Cr.-int. 50. Did he, when he made these drawings for you, have any other pencils with him of different structure from this rubber one? If so, how many, and what?

Ans. He had none of his own; my daughter gave him some two or three to select from.

Cr.-int. 51. Then do I rightly understand you to say that of all the different kinds of pencils you have seen Mr. Dunton use you can only describe this one, and state the date when you first saw it? Is that so?

339 Ans. I know when he cut large capitals he used a larger piece of rubber in the end of a larger pencil, that seemed to grasp it, and with red chalk in one end, and sometimes black lead. This piece of rubber was much larger than the small pencils, and looked more like a slate-pencil than anything else. I have seen him use those in cutting capitals.

Cr.-int. 52. You don't remember the occasion when you first saw him use one of those, do you? If so, when was it?

Ans. I do not.

Cr.-int. 53. In the pencil which you saw in May, 1852, was the rubber so small that when it was in the grooves the two pieces making up the pencil came close together, or were they held apart by the rubber?

Ans. I think the pencil, when tied, came tightly together, as the rubber he put in it was about the size of the lead he took out, or perhaps a little larger, as it was pressed in with the knife.

Cr.-int. 54. When and by whom was the matter of these pencils recalled to your memory in relation to your testimony in this suit?

Ans. It's a week ago last Saturday, the 23d—a week ago—the day after Washington's birthday. Mr. Dunton asked me if I had ever seen a pencil made with rubber in it. I said yes; like one of those school-pencils, I thought he had reference to. He then said, "Yes. But did you ever see me use one with rubber in it?" I said, "Yes; you made one at my house once, don't you recollect?" He said he recollected the circumstance perfectly that I referred to. I asked him why he asked, and he said there was a case pending in the affair.

Cr.-int. 55. Was this conversation at your house? And if not, where was it?

Ans. No; at Mr. Dunton's room, on Tremont street.

Cr.-int. 56. By "those school-pencils," in that remark, did you mean those rubber-tipped pencils which are now in general use? I mean a pencil like this? [A pencil produced, offered in evidence by the plaintiff's counsel, identified as "Complainant's Exhibit 9," and so marked by the magistrate, is the one here referred to.]

340 Ans. Yes; one like that.

Cr.-int. 57. When you called on Mr. Dunton the other day did you tell him the story as you have told it here to-day?

Ans. Perhaps not quite so precisely; but called to his memory the

time when he made it. He said he recollected the circumstance perfectly, as I have stated to you.

Cr.-int. 58. Did you remind him, or did he remind you, that the rubber was inside the pencil?

Ans. He did not; but I spoke of it, as at the time he made it I was very curious to know about it—to know how he was going to use it.

Cr.-int. 59. What was it that made you very curious to know how he was going to use it?

Ans. Nothing more than it was natural for me at the time to be very curious about drawing or writing or elocution, or anything that appertains to education. I had a large family to bring up.

Cr.-int. 60. Did he remind you, or did you remind him, that the pencil was tied with a white thread?

Ans. I reminded him of it; asked him if he didn't remember about Octavia's tying it with a white thread. He said he did, perfectly.

Had you any conversation at that time with Miss Octavia about it?

Ans. I had never named it to her until a week had elapsed. Mr. Thacher had called on me before I named it to her—that there was anything said about it.

Cr.-int. 62. Prior to this conversation with Mr. Dunton, had you had occasion to speak to any one in relation to this pencil since 1855? If yes, state the circumstances and the conversation.

Ans. I had not the slightest provocation to mention the pencil in any way.

Cr.-int. 63. Is Exhibit 9 about the size of the pencil of May, 1852?

Ans. No; I should think the red-cedar pencil was a larger size
341 than that, and of a very common make, as at that time they didn't make pencils very nicely. It was larger round than that.

Cr.-int. 64. With whom have you conversed since your conversation with Mr. Dunton in relation to this pencil? State all of them, and what you said to them, and what they said to you upon the subject.

Ans. I never have spoken with any one, except my daughter, on the subject, and that was after Mr. Thacher called on me. I asked her if she recollected Mr. Dunton's making a pencil at our house many years ago. She said yes, the red-cedar one, said she, that I tied with two white threads. I told her yes, that there was a case pending. She said she recollected it perfectly.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto.

Int. 33. Have you ever been a witness before in any case?

Ans. Once, only.

Int. 34. Will you please look at this, and state if you have ever seen it before? (A pencil-eraser produced and shown witness is the article referred to.)

Ans. Why, yes; it has been in my writing-desk ever so many years.

Int. 35. When and from whom did you get it?

Ans. I presume that it was left on some of my tables by Mr. Dunton. I can't state when; many years ago.

Int. 36. What did you do with it when it left your possession?

Ans. I gave it to Mr. Dunton about a week ago; less than a week; and asked him if it was his. He said it was, and seemed perfectly delighted.

L. B. PENDLETON.

The pencil-eraser shown to witness at interrogatory 34 above has been marked by me "Defendant's Exhibit D," and is offered by defendant's counsel in evidence.

F. DODGE,
Notary Public.

342 U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER. }

The deposition of OCTAVIA O. SPRAGUE, taken on behalf of the defendant, before Frederic Dodge, notary public and special examiner of said court, at Boston, in the district of Massachusetts, on Wednesday, March 5th 1873; Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for the complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. What is your name and residence?

Ans. Octavia O. Sprague; 744 Fourth street, South Boston.

Int. 2. You are the daughter of the last witness, Mrs. Lavinia B. Pendleton, I understand. Were you present while she testified, and did you hear her testimony?

Ans. I am her daughter; I was present and heard her testimony.

Int. 3. Do you remember the visit of Mr. A. R. Dunton to your mother's house in May, 1852, and his making the pencil-eraser, as stated and described by your mother?

Ans. Yes.

Int. 4. Please state what occurred.

Ans. He wished for an eraser, and not having any that suited him he made one to suit himself, from a piece of rubber inserted in a pencil. He split the pencil, took out a piece of the lead, inserted the rubber, and put it together again; it was a common red-cedar pencil.

343 Int. 5. Where did he get the rubber? and describe the piece he inserted.

Ans. I gave it to him; it was a little narrow piece about an inch or an inch and a half long, and small enough to fit the groove.

Int. 6. Did you give it to him in a strip?

Ans. No; I gave it to him in a piece, and he cut it himself.

Int. 7. In what part of the pencil did he insert it?

Ans. In the end.

Int. 7. How did he fasten the pencil together again?

Ans. By cutting two little grooves around the pencil, and I tied it with thread; a thread in each one of the grooves.

Int. 9. With what instrument, if any, did he make this pencil-eraser?

Ans. With a knife.

Int. 10. After he had made it, did he do anything; and, if so what, to prepare it for use?

Ans. Pointed it a little; pointed it same as you would a pencil, with his knife.

Int. 11. Did he use this pencil-eraser? If so how, and on what work?

Ans. He used it to erase lines that he did not like, and on cards.

time when he made it. He said he recollected the circumstance perfectly, as I have stated to you.

Cr.-int. 58. Did you remind him, or did he remind you, that the rubber was inside the pencil?

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Cr.-int. 59. What was it that made you very curious to know how he was going to use it?

Ans. Nothing more than it was natural for me at the time to be very curious about drawing or writing or elocution, or anything that appertains to education. I had a large family to bring up.

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Ans. I reminded him of it; asked him if he didn't remember about Octavia's tying it with a white thread. He said he did, perfectly.

Had you any conversation at that time with Miss Octavia about it?

Ans. I had never named it to her until a week had elapsed. Mr. Thacher had called on me before I named it to her—that there was anything said about it.

Cr.-int. 62. Prior to this conversation with Mr. Dunton, had you had occasion to speak to any one in relation to this pencil since 1855? If yes, state the circumstances and the conversation.

Ans. I had not the slightest provocation to mention the pencil in any way.

Cr.-int. 63. Is Exhibit 9 about the size of the pencil of May, 1852?

Ans. No; I should think the red-cedar pencil was a larger size
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Cr.-int. 64. With whom have you conversed since your conversation with Mr. Dunton in relation to this pencil? State all of them, and what you said to them, and what they said to you upon the subject.

Ans. I never have spoken with any one, except my daughter, on the subject, and that was after Mr. Thacher called on me. I asked her if she recollected Mr. Dunton's making a pencil at our house many years ago. She said yes, the red-cedar one, said she, that I tied with two white threads. I told her yes, that there was a case pending. She said she recollected it perfectly.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto.

Int. 33. Have you ever been a witness before in any case?

Ans. Once, only.

Int. 34. Will you please look at this, and state if you have ever seen it before? (A pencil-eraser produced and shown witness is the article referred to.)

Ans. Why, yes; it has been in my writing-desk ever so many years.

Int. 35. When and from whom did you get it?

Ans. I presume that it was left on some of my tables by Mr. Dunton. I can't state when; many years ago.

Int. 36. What did you do with it when it left your possession?

Ans. I gave it to Mr. Dunton about a week ago; less than a week; and asked him if it was his. He said it was, and seemed perfectly delighted.

L. B. PENDLETON.

The pencil-eraser shown to witness at interrogatory 34 above has been marked by me "Defendant's Exhibit D," and is offered by defendant's counsel in evidence.

F. DODGE,
Notary Public.

342 U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of OCTAVIA O. SPRAGUE, taken on behalf of the defendant, before Frederic Dodge, notary public and special examiner of said court, at Boston, in the district of Massachusetts, on Wednesday, March 5th 1873; Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for the complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. What is your name and residence?

Ans. Octavia O. Sprague; 744 Fourth street, South Boston.

Int. 2. You are the daughter of the last witness, Mrs. Lavinia B. Pendleton, I understand. Were you present while she testified, and did you hear her testimony?

Ans. I am her daughter; I was present and heard her testimony.

Int. 3. Do you remember the visit of Mr. A. R. Dunton to your mother's house in May, 1852, and his making the pencil-eraser, as stated and described by your mother?

Ans. Yes.

Int. 4. Please state what occurred.

Ans. He wished for an eraser, and not having any that suited him he made one to suit himself, from a piece of rubber inserted in a pencil. He split the pencil, took out a piece of the lead, inserted the rubber, and put it together again; it was a common red-cedar pencil.

343 Int. 5. Where did he get the rubber? and describe the piece he inserted.

Ans. I gave it to him; it was a little narrow piece about an inch or an inch and a half long, and small enough to fit the groove.

Int. 6. Did you give it to him in a strip?

Ans. No; I gave it to him in a piece, and he cut it himself.

Int. 7. In what part of the pencil did he insert it?

Ans. In the end.

Int. 7. How did he fasten the pencil together again?

Ans. By cutting two little grooves around the pencil, and I tied it with thread; a thread in each one of the grooves.

Int. 9. With what instrument, if any, did he make this pencil-eraser?

Ans. With a knife.

Int. 10. After he had made it, did he do anything; and, if so what, to prepare it for use?

Ans. Pointed it a little; pointed it same as you would a pencil, with his knife.

Int. 11. Did he use this pencil-eraser? If so how, and on what work?

Ans. He used it to erase lines that he did not like, and on cards.

Int. 12. Did he use the pencil end, too?

Ans. Yes.

Int. 13. What kind of cards were these, and how did he draw them?

Ans. They were visiting-cards. Some were with the name plain, some were scrolled pattern, and little devices.

Int. 14. How many cards did he so draw with that pencil-eraser?

Ans. Can't say how many; quite a number.

Int. 15. How long was he at your mother's house at that time?

Ans. Well, a day and a half.

Int. 16. Did he so draw said cards on both of said days?

344 Ans. Yes; and anything else his idle pencil found to do.

Int. 17. Of what material were those cards composed?

Ans. Some were enamel, some were Bristol board.

Int. 18. Was anything said by Mr. Dunton, and, if so, what, in relation to any previous use of said pencil-erasers by him?

(Objected to as hearsay.)

Ans. He said he'd used them before.

Int. 18. After this visit, were you accustomed to see Mr. Dunton? If so, how often, where, and for how long a time?

Ans. Yes. I was accustomed to see him occasionally—from that time to this, occasionally. He called sometimes at home, at the house; and sometimes I saw him at his rooms, 228 Washington street.

Int. 20. Were those rooms public?

Ans. Yes.

Int. 21. After his visit to your mother's house in May, 1852, did you ever see him again using such pencil-erasers, and, if so, how often and where, and for how long?

Ans. Yes. I saw him use them at his rooms, and at home, too—at my home—I couldn't say how often, for several years.

Int. 22. How were those pencil-erasers which you so saw him use subseq'ently fastened together?

Ans. I don't know. They were very neatly made. I never asked.

Int. 23. Were they tied together with strings as the first one you saw him make was?

Ans. No, sir.

Cross-interrogatories by Mr. Blake for complainant, and answers of the witness thereto:

Cr.-int. 1. How old were you in May, 1852?

Ans. Perhaps I was seventeen.

Cr.-int. 2. Were you seventeen?

345 Ans. Yes, I was.

Cr.-int. 3. What were you doing at that time?

Ans. I was at school.

Cr.-int. 4. How long did you continue to go to school after that time?

Ans. Not long.

Cr.-int. 5. Did you afterwards marry, and when?

Ans. In the next year.

Cr.-int. 6. Are you still married?

Ans. Yes.

Cr.-int. 7. And you and your husband live with your mother?

Ans. We live with my mother.

Cr.-int. 8. Why do you think that it was in May, 1852, that you saw this pencil?

Ans. Because it was before I was married—in the year before.

Cr.-int. 9. At the time when you saw it, how long had you known Mr. Dunton?

Ans. It was the first of my knowing him; that I recollect seeing him; the first time he called at our house. It was the first time I ever saw him to know him.

Cr.-int. 10. What particular interest had this pencil for you at that time?

Ans. None at all.

Cr.-int. 11. Do you remember anything else that happened in May, 1852? If so, please state it.

Ans. I do not, anything particular.

Cr.-int. 12. Do you remember anything else that was talked of on the occasion when you saw the pencil?

Ans. No; only that he spoke of his writing at New Orleans, and making those same pencils, only in a better manner.

Cr.-int. 13. Do you remember anything else that was said at that time?

Ans. I do not.

Cr.-int. 14. Were you present when he was making these drawings?

Ans. I was.

346 Cr.-int. 15. Was it in the morning or in the evening?

Ans. In the afternoon, I think, at first, and then he finished them the next morning.

Cr.-int. 16. Were you at home that evening?

Ans. I was.

Cr.-int. 17. What makes you think that you tied up these pencils with white thread?

Ans. Well, there didn't seem to be anything to keep them together.

Cr.-int. 18. Is that the only reason you think it was white thread?

Ans. Well, it would require something a little stout to tie them; of course white cotton was quite handy.

Cr.-int. 19. How do you know it was white; and how do you know it was handy? Do you remember?

Ans. I do.

Cr.-int. 20. Is there any circumstance connected with it?

Ans. That Mr. Dunton said, "It is easier to tie that knot than some others."

Cr.-int. 21. Do you remember anything else that Mr. Dunton said?

Ans. Nothing very particular.

Cr.-int. 22. Do you remember what you said in reply to him?

Ans. No.

Cr.-int. 23. Do I rightly understand, then, that you remember that this was tied up with a white thread, because Mr. Dunton said, "This knot is more easy to tie than some others;" and that there are no other circumstances connected with that tying to aid your memory?

Ans. Not as I recollect, but I distinctly remember that it was tied up with white thread.

Cr.-int. 24. Do you remember what you wore that night?

Ans. I haven't the slightest idea.

Cr.-int. 25. Do you remember how your hair was dressed that night?

Ans. Not in particular.

347 Cr.-int. 26. Do you remember anything that Mr. Dunton said or did that night that you have not already testified to; and, if so, what was it?

Ans. No; nothing in particular.

Cr.-int. 27. You remember the size of the piece of rubber that he put in the pencil, don't you?

Ans. Yes.

Cr.-int. 28. Was it of such size as to admit of the two pieces of the pencil being closely united at the end containing the rubber?

Ans. It was.

Cr.-int. 29. Do you distinctly remember seeing him use the lead end of the pencil containing the rubber to draw with at that time?

Ans. Yes.

Cr.-int. 30. What occasion had you to go to the office of Mr. Dunton, as you have testified?

Ans. Sometimes to see his beautiful writing and drawing; sometimes to meet friends.

Cr.-int. 31. When you went there you used to look at the various implements used by him in writing and drawing, didn't you?

Ans. Yes.

Cr.-int. 32. And it was on these occasions that you saw the other pencils spoken of in your testimony, I suppose?

Ans. Yes.

Cr.-int. 33. Now, can you describe any implements other than these pencils that you saw on these occasions?

Ans. Well, there was something like a little claw that held a piece of chalk, or a piece of rubber, or black lead, at each end.

Cr.-int. 34. Do you know which it held, black lead, rubber, or chalk?

Ans. Either, because he could take out and put in which he pleased.

Cr.-int. 35. Do you remember the first time and under what circumstances you first saw this implement?

Ans. I think it was when he was making charts.

Cr.-int. 36. Do you remember the year and month?

348 Ans. I think it was the same year; I don't remember the month.

Cr.-int. 37. Do you recollect when you first saw any other implement for writing and drawing there, and particularly when you first saw it?

Ans. Nothing, only this rubber pencil when he made it, in particular.

Cr.-int. 38. Since the time when this rubber pencil was made, have you had occasion to think of it before the matter of this suit came up?

Ans. No.

Cr.-int. 39. You have talked with your mother, Mr. Washburn, and Mr. Dunton, in regard to this suit?

Ans. Yes.

Cr.-int. 40. You tied these threads, I believe. How far from the end of this pencil did you tie them?

Ans. About an inch, I believe, so as to give a chance to point the pencil.

Cr.-int. 41. What is your husband's business?

Ans. He is a clerk in the First National Bank of St. Paul, Minnesota.

Cr.-int. 42. How long has he lived in St. Paul?

Ans. About a year and a half. I have not been there yet.

Cr.-int. 43. Now, please give me his whole name.

Ans. William A. Sprague.

Additional direct interrogatories by Mr. Washburn for defendant, and answers of the witness thereto:

Int. 24. Why did your husband go to St. Paul?

Ans. He went there for business.

Int. 25. Why did you not go there yourself?

Ans. Because I did not want to go.

Int. 26. Have you ever been a witness before in any case?

Ans. Never.

OCTAVIA O. SPRAGUE.

349 U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of JAMES A. PAGE, taken on behalf of the defendant, before Frederic Dodge, a notary public and special examiner of said court, at Boston, in the district of Massachusetts, on Wednesday, March 5th, 1873, Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for the complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. What is your name, residence, and occupation?

Ans. James A. Page; 1676 Washington street, Boston; head master of the Dwight School.

Int. 2. How long have you held the position of head master of that school in Boston?

Ans. Since 1850.

Int. 3. Prior to that time what, if any, connection had you had with that school, and from what time?

Ans. I had been usher and submaster from 1846.

Int. 4. When first, if ever, did you see a lead-pencil combined with an eraser in the same pencil? and describe it, and state your knowledge of it.

Ans. I saw it before the removal of the school from Concord street to Springfield street, where it is now located; that took place in November, A. D. 1856. The pencil, as I recall it, was a lead-pencil with rubber at one end of it and lead at the other end; it had a small longitudinal
350 piece of rubber inserted, and was cut away, so that the rubber was usable; that describes it in general; the pencil I judge to be of cedar-wood.

Int. 5. How large was that section of rubber as it appeared at the end?

Ans. A little larger than the size of the lead; about the size of the lead; my impression is, a little longer.

Int. 6. Where and in whose possession was that pencil-eraser?

Ans. On my desk, in my possession; my desk in the Dwight School.

Int. 7. How long did you have that pencil-eraser, and in use, prior to the removal of the Dwight School in Nov., 1856?

Ans. I can't say how long.

Int. 8. State how long, to the best of your recollection.

Ans. I should say several months, at least.

Int. 9. Please look at the pencil-eraser now shown you, and state how the pencil-eraser you have testified to compared with it.

Ans. It was not unlike that; it had the same flexible end.

Int. 10. Had it the same arrangement of rubber and lead in its respective ends?

Ans. As I recall it, it had.

[The pencil-eraser referred to in the last two questions has been offered in evidence, identified, and marked by me "Defendant's Exhibit E."—F. DODGE, *Notary Public.*]

Int. 11. Do you know Alvin R. Dunton, now present, and, if so, how long have you known him?

Cr.-int. 22. And you came to testify at his request, after having stated what you have stated here?

Ans. I did.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 17. Has any one claiming to represent the plaintiff in this case applied to you for, and, if so, have you made to him the same statement?

Ans. It wouldn't be possible for me to know whether he was plaintiff or not; a gentleman did call upon me, who said he represented the other side from Mr. Thacher, and I made the same statement to him; I could not recall his name, if he gave it; it was several months ago; I should think two months ago.

JAS. A. PAGE.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of CHARLES A. EVANS, taken on behalf of the defendant before Frederic Dodge, notary public and special examiner of said court, on Thursday, March 6th, A. D. 1873, at Boston, in the district of Massachusetts; Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

355 Direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 1. What is your name, residence, and occupation, and place of business?

Ans. Charles A. Evans; Revere, Mass.; lithographer; 116 Washington street, Boston.

Int. 2. Are you acquainted with Alvin R. Dunton, of Boston? If so, how long have you known him?

Ans. I am acquainted with him; I have known him since August, 1855.

Int. 3. Have you ever had any business relations with him; and, if so, what?

Ans. Well, I've done printing for him; specimen-books.

Int. 4. What kind of books; and when?

Ans. Writing-books; in August, 1855;

and from then at different times until the fall of 1856; I was doing those books, those copy-books, and Dunton used to come up into the room; I was at work for Moore & Crosby at the time, No. 1 Water street; Mr. Whittemore was the publisher of those copy-books.

Int. 5. Have you any knowledge of the pencil in which was combined an arrangement of rubber and lead, in the possession of Mr. Dunton? And, if so, state your knowledge, and describe the same, and fix the date.

Ans. In August, 1855, Mr. Dunton came to my press and asked me to pull him a specimen-book; pulling means lithographic printing; I gave him some books, and he said he would write me some cards; I told him I should be very glad to have him; he wrote me some cards; am pretty positive he wrote me three at the time; he gave me the cards, and on those cards was my name; I examined the cards, and he took his impression of the book and went down stairs; I found after he had

gone he had left a pencil; the pencil with which he wrote them; I called him back, and said, "Mr. Dunton, you've left your pencil." At the same time I examined the pencil, as it was in my hand; there
356 was rubber in one end, and lead in the other end; the pencil was sharpened at each end; it was red cedar, I should judge; that color; I asked him what he done with the rubber, and he said he'd show me when he came in again; he came in in a few days from that time; perhaps the third day; I couldn't hardly state; somewhere in that vicinity, and wrote me some more cards with, I should judge, the same pencil that he had when he was there before; these cards were some of them fancy cards, that is, scrolls and birds; then he showed me how he used this rubber in the end by blending the roses that he had on the card, and making a nice tint. I don't know as there's anything more, particular.

Int. 6. Where did he write those cards?

Ans. In the room where I was printing.

Int. 7. Did you see him write them, and use this pencil in doing so?

Ans. I did.

Int. 8. Of what material were the cards?

Ans. Bristol board.

Int. 9. Please look at this pencil. (Defendant's Exhibit E.) How did the pencil which he used, and you have described, compare with this?

Ans. All but with the exception of the rubber; the rubber of that was dark.

Int. 10. Did he subsequently, and, if so, when, write any more of said cards for you?

Ans. Yes; well, soon after, I can't just state the time; three or four times.

Int. 11. With what pencil did he write those? Whether with the same pencil, or one like it?

Ans. Well, I didn't pay so much attention to the last.

Int. 12. Did you ever subsequently see him use the pencil-eraser like Exhibit E? If so, when and how often?

Ans. I did. Saw him use it in 1871, in his room on School street; can't call to mind the number of the room. I saw him use it a number of times.

Int. 13. What room was this?

357 Ans. That's a room that he had in getting up this series of books that he publishes now. It was his writing-room. It was open to the public.

Int. 14. Did you ever have any conversation with him in relation to when he adopted or commenced using such a pencil? If so, what?

(Objected to as hearsay, immaterial, and incompetent.)

Ans. No, never had.

Int. 15. How are you able to fix August, 1855, as the time when you saw and Mr. Dunton showed you the said pencil-eraser?

Ans. By my account-book.

Int. 16. Have you still that account-book? and, if so, please produce it.

Ans. I have, and do now produce it.

Int. 17. Please state how you fix said time from this account-book.

Ans. I made him some specimen-books in August, 1855, the time he wrote me those cards, and there are entries of those books here.

Int. 18. State which entry you refer to.

Ans. I refer to copy-book No. 2, and the entry in my memorandum-book of date August 11th, 1855.

(The memorandum-book and entry referred to in the last two interrogatories and answers thereto are produced and offered in evidence by the defendant's counsel. The book has been identified by the magistrate and marked "Defendant's Exhibit F.")

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 1. When did you first see Mr. Dunton?

Ans. In August, 1855.

Cr.-int. 2. Was the occasion, in regard to which you have testified, when he wrote you the cards the first time you ever saw him?

Ans. No; I saw him before.

Cr.-int. 3. When, and where?

358 Ans. No. 1 water street; in August 1855. July or August; think it was toward the last of July.

Cr.-int. 4. When did you next see him after the last occasion testified to by you, when he wrote your cards?

Ans. I saw him frequently.

(Question repeated.)

I can't state just the time; just the day; but soon after.

Cr.-int. 5. How often have you seen him from the date last mentioned by you until the present time?

Ans. I couldn't state; many times.

Cr.-int. 6. Have you done any work for him since?

Ans. I have.

Cr.-int. 7. When did you last do any work for him?

Ans. In 1871.

Cr.-int. 8. How much work have you done for him in all?

Ans. I never done any work for him direct; only one job; that amounted to five dollars.

Cr.-int. 9. Has he procured you any work to be done by others?

Ans. I can't say if he did; no, I don't think he did; I am sure he didn't.

Cr.-int. 10. Up how many flights of stairs was your room situated in which Mr. Dunton wrote the cards upon the first occasion testified to by you?

Ans. I think third floor.

Cr.-int. 11. State all that was said by him, and all that was said by you, when you called him back and until you finally went away.

Ans. I told him that he'd left his pencil; he came back, and I had the pencil in my hand; I asked him what he used the rubber for; he told me he would show me when he came in again; he then went away.

Cr.-int. 12. How far down the stairs had Mr. Dunton gone when you called him back?

Ans. I can't say how far down, but should say to the bottom of the stairs; I don't think he'd left the stairs.

359 Cr.-int. 13. Is the Mr. Dunton to whom you refer, the one who was here present yesterday while you were waiting to give your testimony?

A. Yes.

Cr.-int. 14. How often were you in Mr. Dunton's rooms in School street in 1871?

Ans. A great number of times.

Cr.-int. 15. Did you handle or examine the article you there saw him using?

Ans. I did.

Cr.-int. 16. Was that like defendant's Exhibit E, only darker at the end where the rubber appears?

Ans. It was.

Cr.-int. 17. And similar to the one you saw him use in 1855?

Ans. Yes, sir.

Cr.-int. 18. Did you ever see anybody else in Mr. Dunton's room in School street, where you saw him, besides yourself and Mr. Dunton?

Ans. I did.

Cr.-int. 19. How many did you ever see there, either at one time or upon successive occasions?

Ans. I have seen three or four in there at a time.

Cr.-int. 20. Have you struck off Mr. Dunton's books, either for himself or in filling orders for others, at various times since 1855?

Ans. I have.

Cr.-int. 21. Did you do so during any of the years 1856, 1857, 1858, 1859, and 1860?

Ans. I printed his punctuation-plate for Whittemore in 1857; that was all I did from 1855 to 1871.

Cr.-int. 22. Who first asked you to testify in this cause?

Ans. I was at Mr. Dunton's room; that was in February; the last of February; this last February; he asked me if I remembered his using a pencil with rubber in the end; I told him where I see him use it.

Cr.-int. 23. Did he remind you of the occasion when he left his pencil behind him?

360 Ans. He did not; he told me the time he thought it was, and I told him I thought it was earlier. I told him I could tell just the time.

Cr.-int. 24. Did he then show you how he had used it?

Ans. No; he didn't show me; he didn't say.

Cr.-int. 25. What was the occasion of your going to Mr. Dunton's rooms in February last?

Ans. Nothing particular brought me there; I'd been in and out frequently at his office.

Cr.-int. 26. You had no business there on the occasion you called?

Ans. Well, only a friendly visit, that's all.

Cr.-int. 27. Were any of the pencils with rubber at one end, and which you say you saw Mr. Dunton use, painted, enameled, or varnished?

Ans. I think not.

Cr.-int. 28. In that respect they were all like defendant's Exhibit E?

Ans. No; they wasn't all like that.

Cr.-int. 29. How did they differ?

Ans. Well, in size and shape, I should say.

Cr.-int. 30. Have you received any compensation for testifying in this case?

Ans. I have not.

Cr.-int. 31. Has anybody told you that you should be compensated?

Ans. I think not; I'm sure not.

Cr.-int. 32. Has anything been said to you on that subject by any other person than the counsel in the case?

Ans. There has not.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int What kind of cards were those Mr. Dunton wrote for you in August, 1855?

Ans. They were visiting-cards; small visiting-cards; I think I can get some at home now.

Int. 20. Was the said pencil-eraser and Mr. Dunton's use of it, when you saw him using it at his writing rooms in 1871, as you have
361 testified, open to the observation and examination of any persons who were there, or who came in, or otherwise?

(Objected to as leading, and as calling for a fact beyond the witness' knowledge. Question withdrawn.)

Int. 21. How did said Dunton use the said pencil-eraser when you saw him use it in 1871 at his writing-rooms, as you have testified, and where did he use it with reference to the ability or want of ability of any person or persons who were there or came in to observe his use of said pencil-eraser, and examine it?

Ans. I couldn't say who came in; any one could see and examine it.

CHAS. A. EVANS.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of SILAS C. THOMAS, taken, on behalf of the defendant, before Frederic Dodge, notary public and special examiner of said court, on Thursday, March 6th, A. D. 1873, at Boston, in the district of Massachusetts, Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for complainant, John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 1. State your name, residence, and business.

Ans. Silas C. Thomas; 102 Decatur street, East Boston; physician; practitioner.

362 Int. 2. Are you acquainted with Alvin R. Dunton, now present; and, if so, how long have you known him?

Ans. I am; I have known him thirty-five years.

Int. 3. Where did you reside in 1855?

Ans. In the town of Camden, Maine.

Int. 4. Did you see Mr. Dunton there during that year? If so, when, and under what circumstances?

Ans. I saw him in November, at my father's; about thanksgiving time; he was there on a visit; my father told me that he was there, and wanted me to come up and spend the evening; I spent the evening, and was there the next day; his wife was with him.

Int. 5. How long did you understand he had then been married?

(Objected to as immaterial, irrelevant, and hearsay.)

Ans. I don't know just the number of months; several months.

Int. 6. At that time had you any experience yourself in penmanship; and, if so, what?

Ans. Well, I'd always taken a great liking to penmanship and card-marking, and had done considerable of it from my boyhood up to that time; I did not teach, but called myself a good penman.

Int. 7. At that time had you any interview with said Dunton in relation to writing, or in which any writing or drawing was done by him in your presence; and, if so, what occurred?

Ans. I did; I found him drawing and marking cards; at my father's, on my second visit; on both Bristol board and enameled surface; I noticed in his drawings that he blended the shades very nicely, and after he had executed quite a number I examined his styles and pencils; one of the pencils—a common cedar-pencil—had a piece of lead in one end and rubber in the other; I wanted one of them, and also one of the styles, and asked him to sell me a style and pencil; he said the styles were worth fifty cents; he didn't really want to spare them, but he finally sold me one of those pencil-erasers which I have de-
363 scribed, and a style, that he manufactured himself; I marked a great many cards after that, and there was a decided improvement on them.

Int. 8. Please look at the pencil (Defendant's Exhibit E) now shown you, and state how the said pencil-eraser, which you have described as then seeing Mr. Dunton use, compared with this exhibit?

Ans. It was similar in every respect with the exception of the rubber. To the best of my recollection the rubber was dark; darker than that. It was a common cedar pencil like that.

Int. 9. Was the arrangement of the rubber and lead in that pencil-eraser the same as in this exhibit?

(Objected to as leading, and withdrawn.)

Int. 10. How did the arrangement of the lead and the rubber in that pencil-eraser compare with the arrangement in this exhibit?

Ans. Why, I should say it was the same in every respect, and made in the same way.

Int. 11. Did you see him use both ends of said pencil-eraser when he so drew the cards, as you have testified?

Ans. I did.

Int. 12. Did you ever use, yourself, the said pencil-eraser which you so purchased from him; and, if so, to what extent, and how long?

Ans. I used it many times for drawing; for two or three years; occasionally.

Int. 13. Did you ever, yourself, make such a pencil-eraser as that which you so purchased from Mr. Dunton?

(Objected to as leading.)

Ans. I did make one like the one that I had from Dunton.

Int. 14. What became of that pencil-eraser which you made, like that which you purchased from Mr. Dunton?

Ans. I have it in my pocket at the present time.

Int. 15. Please produce it.

Ans. (The witness produces a pencil in answer to this
364 interrogatory, which is offered in evidence by the defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit G.")

Int. 16. Was this pencil-eraser, Exhibit G, when you first made it, of the same length that it *is* now is?

Ans. It was longer when it was first made.

Int. 17. How long was it then?

Ans. I couldn't say whether it was a whole pencil or two-thirds of it. It has been cut away, however, at both ends.

Int. 18. For what purpose has it been cut away at both ends?

Ans. In marking cards or any devices, in use, it is necessary to have a fine point; in shading scrolls, birds, or anything like that, in order not to rub out the outlines.

Int. 19. When did you make defendant's Exhibit G?

Ans. In 1860 or 1861, as I had occasion to use such a pencil in draw-

Ans. They were visiting-cards; small visiting-cards; I think I can get some at home now.

Int. 20. Was the said pencil-eraser and Mr. Dunton's use of it, when you saw him using it at his writing rooms in 1871, as you have
361 testified, open to the observation and examination of any persons who were there, or who came in, or otherwise?

(Objected to as leading, and as calling for a fact beyond the witness' knowledge. Question withdrawn.)

Int. 21. How did said Dunton use the said pencil-eraser when you saw him use it in 1871 at his writing-rooms, as you have testified, and where did he use it with reference to the ability or want of ability of any person or persons who were there or came in to observe his use of said pencil-eraser, and examine it?

Ans. I couldn't say who came in; any one could see and examine it.

CHAS. A. EVANS.

Circuit court of the U. S., southern district of N. Y.

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vs.
EBERHARD FABER. } In equity.

The deposition of SILAS C. THOMAS, taken, on behalf of the defendant, before Frederic Dodge, notary public and special examiner of said court, on Thursday, March 6th, A. D. 1873, at Boston, in the district of Massachusetts, Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for complainant, John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 1. State your name, residence, and business.

Ans. Silas C. Thomas; 102 Decatur street, East Boston; physician; practitioner.

362 Int. 2. Are you acquainted with Alvin R. Dunton, now present; and, if so, how long have you known him?

Ans. I am; I have known him thirty-five years.

Int. 3. Where did you reside in 1855?

Ans. In the town of Camden, Maine.

Int. 4. Did you see Mr. Dunton there during that year? If so, when, and under what circumstances?

Ans. I saw him in November, at my father's; about thanksgiving time; he was there on a visit; my father told me that he was there, and wanted me to come up and spend the evening; I spent the evening, and was there the next day; his wife was with him.

Int. 5. How long did you understand he had then been married?

(Objected to as immaterial, irrelevant, and hearsay.)

Ans. I don't know just the number of months; several months.

Int. 6. At that time had you any experience yourself in penmanship; and, if so, what?

Ans. Well, I'd always taken a great liking to penmanship and card-marking, and had done considerable of it from my boyhood up to that time; I did not teach, but called myself a good penman.

Int. 7. At that time had you any interview with said Dunton in relation to writing, or in which any writing or drawing was done by him in your presence; and, if so, what occurred?

Ans. I did; I found him drawing and marking cards; at my father's, on my second visit; on both Bristol board and enameled surface; I noticed in his drawings that he blended the shades very nicely, and after he had executed quite a number I examined his styles and pencils; one of the pencils—a common cedar-pencil—had a piece of lead in one end and rubber in the other; I wanted one of them, and also one of the styles, and asked him to sell me a style and pencil; he said the styles were worth fifty cents; he didn't really want to spare them, but he finally sold me one of those pencil-erasers which I have de-
363 scribed, and a style, that he manufactured himself; I marked a great many cards after that, and there was a decided improvement on them.

Int. 8. Please look at the pencil (Defendant's Exhibit E) now shown you, and state how the said pencil-eraser, which you have described as then seeing Mr. Dunton use, compared with this exhibit?

Ans. It was similar in every respect with the exception of the rubber. To the best of my recollection the rubber was dark; darker than that. It was a common cedar pencil like that.

Int. 9. Was the arrangement of the rubber and lead in that pencil-eraser the same as in this exhibit?

(Objected to as leading, and withdrawn.)

Int. 10. How did the arrangement of the lead and the rubber in that pencil-eraser compare with the arrangement in this exhibit?

Ans. Why, I should say it was the same in every respect, and made in the same way.

Int. 11. Did you see him use both ends of said pencil-eraser when he so drew the cards, as you have testified?

Ans. I did.

Int. 12. Did you ever use, yourself, the said pencil-eraser which you so purchased from him; and, if so, to what extent, and how long?

Ans. I used it many times for drawing; for two or three years; occasionally.

Int. 13. Did you ever, yourself, make such a pencil-eraser as that which you so purchased from Mr. Dunton?

(Objected to as leading.)

Ans. I did make one like the one that I had from Dunton.

Int. 14. What became of that pencil-eraser which you made, like that which you purchased from Mr. Dunton?

Ans. I have it in my pocket at the present time.

Int. 15. Please produce it.

Ans. (The witness produces a pencil in answer to this
364 interrogatory, which is offered in evidence by the defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit G.")

Int. 16. Was this pencil-eraser, Exhibit G, when you first made it, of the same length that it *is* now is?

Ans. It was longer when it was first made.

Int. 17. How long was it then?

Ans. I couldn't say whether it was a whole pencil or two-thirds of it. It has been cut away, however, at both ends.

Int. 18. For what purpose has it been cut away at both ends?

Ans. In marking cards or any devices, in use, it is necessary to have a fine point; in shading scrolls, birds, or anything like that, in order not to rub out the outlines.

Int. 19. When did you make defendant's Exhibit G?

Ans. In 1860 or 1861, as I had occasion to use such a pencil in draw-

ing or marking cards, having lost the one I bought of Dunton, or mislaid it. I made this for my own use.

Int. 20. After you bought the pencil-eraser from Mr. Dunton did you have any business that required its use? If so, what and when?

Ans. I gave lessons in penmanship several winters, commencing in 1855, till 1861. I used the pencil with rubber end for drawing specimens to be used to get up schools and for card-marking. I have those specimens in my house at the present time.

Int. 21. Did you continue to so use the said pencil-eraser which you purchased from Mr. Dunton from the time you got it until you made Exhibit G?

(Objected to as leading.)

Ans. I used it in 1855, 1856, and 1857. I have no recollection of seeing it since that time, after the time when I had occasion to use one again, when I made the one I have shown here.

365 Int. 22. When you purchased the pencil-eraser from Mr. Dunton did he tell you how he made and used it; and, if so, what did he say?

(Objected to as hearsay and leading.)

Ans. He explained to me how he made the pencil; also said that it was the nicest pencil-eraser that he ever used. (The latter part of this answer objected to as irresponsive.) He said that in getting up his copies that it was very necessary to have a fine-point eraser, for the engravers would engrave just as he wrote the copy, and oftentimes he shaded a letter a little too heavy, and it was necessary to have a fine point to take a part of it off; he showed me how he used it for that purpose; he said he made it by splitting the pencil and inserting a piece of rubber.

Int. 23. How did you make defendant's Exhibit G?

Ans. By splitting a pencil, taking out a piece of lead, and inserting a piece of rubber, and then glueing the two pieces together again.

Int. 24. In whose possession has the pencil-eraser, Exhibit G, been since you made it?

Ans. In my own possession; packed away since 1861; the last of my teaching; giving lessons in penmanship.

Int. 25. After you purchased the pencil-eraser from Mr. Dunton did you have any business connection with him? If so, when and what?

(Objected to as immaterial.)

Ans. I did; assisted him in getting up schools and teaching; in the fall of 1856.

Int. 26. After your purchase of said pencil-eraser did you ever see Mr. Dunton have in his possession and use similar pencil-erasers to that which you purchased; and, if so, how often, and in what places, and when?

Ans. I have seen him use them in the towns of Lincolnville, Hope, Rockland, and Thomaston, in Maine; in the fall of 1856, when he and I were teaching penmanship and drawing in those places.

Int. 27. How did he use them with reference to any other persons besides yourself, if you know?

366 Ans. Well, he always used them in his room in his boarding-house where he stopped, and left them lying round the same as he would any other pencil; he used them as common pencils; there was nothing private about them; there was always persons about, in and out; he was marking cards for them all his leisure time, and always used it in his work; I am sure the last thing I thought of was that there was any patent about it; at that time.

Int. 28. After the fall of 1856 when did you next see Mr. Dunton?

Ans. The next week after the fire in Boston last November; in Boston.

Int. 29. After you ceased teaching penmanship in 1861, what did you next do?

Ans. I was at that time studying medicine, and in August, 1862, I was commissioned assistant surgeon of the Twenty-first Maine Regiment, in the service of the United States, and served in the war in that capacity; I was discharged August 25th, 1863, at Augusta; in January, 1864, I joined the Second Maine Cavalry; was discharged August 26th, 1865; practiced as physician in Belgrade, Maine; I was there till the fall of 1867, when I moved to Augusta, Me., and practiced two years in my profession; for the past two years and a half I have been manufacturing and introducing an anti-bilious pill; up to the time that I sold my right, last September; the right to manufacture; I moved to East Boston Nov. 23d, 1873, where I have since resided, practicing my profession.

(At this point, 2½ p. m., the examination was adjourned by agreement of counsel until 3¼ p. m. of the same day.)

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 1. What is your age?

Ans. Forty-one the second day of March, 1873.

Cr.-int. 2. Where did you receive your diploma?

Ans. I never received one.

367 Cr.-int. 3. Is Mr. Dunton any connection of yours, by marriage or otherwise?

Ans. Very distant, if any.

Cr.-int. 4. What was the maiden name of Mrs. Dunton who was visiting in Camden, in 1855?

Ans. Laura Pendleton.

Cr.-int. 5. Were they visiting at your father's house?

Ans. They were.

Cr.-int. 6. Was the Miss Pendleton to whom you refer, a daughter or relative of Mrs. Pendleton who testified yesterday in your presence?

Ans. She was a daughter.

Cr.-int. 7. Were you then living at your father's house?

Ans. No, sir.

Cr.-int. 8. Where were you living?

Ans. Keeping house in the town of Camden.

Cr.-int. 9. How long did Mr. Dunton remain there the time he came?

Ans. One or two weeks.

Cr.-int. 10. How often did you see him write or draw at that period?

Ans. Whenever I went to my father's and he was there.

Cr.-int. 11. How often was that?

Ans. Well, I may have gone there two or three times; it may have been more; it may have been less; I couldn't say positively about that.

Cr.-int. 12. Did you see him write or draw anything except visiting-cards; and, if so, what?

Ans. I seen him draw swans with a pen and pencil; also quite a number of cards for me, to be used as patterns to draw from; also scrolls of different patterns.

Cr.-int. 13. Did Mr. Dunton, upon the occasion referred to, have more than one implement of the kind described by you, with rubber at one end and lead at the other?

Ans. He had several of the eraser-pencils; also styles, pens, and the ordinary common pencils.

Cr.-int. 14. Were all those which you term eraser-pencils, alike?

368 Ans. According to the best of my recollection, there was but little difference in them.

Cr.-int. 15. And all were like the one that you have described?

Ans. Yes, sir; they were.

Cr.-int. 16. Did he use them all in the same manner?

Ans. They *was* all designed for the same purpose; I presume that he did.

Cr.-int. 17. Who else was present besides yourself on the occasions when you saw him use them?

Ans. My mother and sister.

Cr.-int. 18. Did I understand you to say that you still have in your possession some of the cards executed by him at the time?

Ans. If you did, you misunderstood me.

Cr.-int. 19. Was defendant's Exhibit G a new pencil when you inserted the rubber at one end?

Ans. As near as I can recollect, it was about two-thirds of the length of a new pencil.

Cr.-int. 20. Had the remaining third been used up before the rubber was inserted?

Ans. I presume that it had. I am quite sure that it had been used.

Cr.-int. 21. It had already been sharpened at one end when you inserted the rubber?

Ans. I think it had.

Cr.-int. 22. Where did you make it?

Ans. At home.

Cr.-int. 23. In Camden?

Ans. No, sir; in Hallowell, Maine.

Cr.-int. 24. How did you split the pencil?

Ans. Moistened it, sir, and split it, as you can most any pencil made in that way.

Cr.-int. 25. How much of the lead did you take out—the length?

Ans. From one inch to an inch and a half; I can't be certain.

Cr.-int. 26. How long a piece of rubber did you insert?

Ans. Long enough to fill up the groove where I took the lead out.

369 Cr.-int. 27. Did you make fresh glue to glue it together again?

Ans. That is an article that I most always keep in the house for immediate use. (Question repeated.) Well, as near as I can recollect, I had glue in the house at the time. I don't know that I have been out of it for the last twenty years.

Cr.-int. 28. Did you use some of the glue that you had in the house at the time for this purpose?

Ans. I did.

Cr.-int. 29. With what did you cut the rubber?

Ans. With a shoe-knife.

Cr.-int. 30. And from what did you cut it?

Ans. A piece of rubber that was used for tapping, I think—tapping boots. It was harder than the common kind.

Cr.-int. 31. When did you next see Mr. Dunton after his visit in 1855 to your father's house?

Ans. In the fall of 1856.

Cr.-int. 32. And where?

Ans. At Camden.

Cr.-int. 33. Did you then form a business connection with him?

Ans. I was employed by him in getting up schools and teaching penmanship.

Cr.-int. 34. When did you last see the implement you bought from him with lead at one end and rubber at the other?

Ans. I do not recollect of seeing it since 1857 or 1858.

Cr.-int. 35. Did you use it continually from 1855 to that time?

Ans. Only occasionally.

Cr.-int. 36. Were the implements you saw Mr. Dunton use in the towns of Lincolnville and elsewhere, in the fall of 1856, as you have testified, when you were teaching drawing and other things with him, the same in construction and mode of use as those which you saw in his possession in Camden in 1855?

Ans. They were, precisely.

370 Cr.-int. 37. Who first asked you to testify in this case?

Ans. Mr. Thacher asked me if I knew anything about the pencils that Mr. Dunton used. My attention was called to that fact by receiving a note from Mr. Dunton, February 8th, asking me if I remembered anything about eraser-pencils with rubber in one end and lead in the other, that he used in Camden, at my father's, in 1855.

Cr.-int. 38. Have you that note in your possession?

Ans. Yes, sir. I should have stated that I received that note before I went to Mr. Thacher's. I have it here in my possession.

Cr.-int. 39. Can you give the names of any persons who saw you use either of the two pencils with rubber in the end that you have stated were used by you?

Ans. I cannot say that I can at the present time; it was some time ago—a number of years—since I used anything of the kind.

Cr.-int. 40. Can you give the names of any who, to your knowledge, saw Mr. Dunton use such pencils, other than yourself and your mother and sister?

Ans. No one that was in his rooms could help seeing them, especially if they took any interest in penmanship, card-marking, drawing, or anything of that kind.

Cr.-int. 41. Can you give the names of any such?

Ans. I could give you the names of a hundred by taking time to call to mind those that were in and out of his rooms.

Cr.-int. 42. Is that the only answer you can give to my question?

Ans. I wasn't always in Mr. Dunton's room, and I had other business to attend to when I was with him.

S. C. THOMAS.

ON FRIDAY, *March 7th*, 1873.

Dr. S. C. THOMAS is recalled for further cross-examination by agreement of counsel.

Cr.-int. 43. Has Exhibit G been in your possession since 1861?

Ans. It has, sir.

371 Cr.-int. 44. Do you mean in your personal possession during all that time?

Ans. I mean, sir, to say that was packed away at the close of my last school—writing-school—in Augusta, in 1861, with pens, pencils, and such other pencils as I used at the time of teaching.

Cr.-int. 45. In what was it packed, and by whom?

Ans. It was packed by myself or put away the same as any one would put away pens and pen-holders or other things that they used, with a pencil I bought in 1855, like defendant's Exhibit P, a style. The style

my little boy got, as he took to drawing and making cards, and I have never seen it since, but I recognize Exhibit P as similar, with amalgam at the end, and I have thirty-two cards now hanging in my house that I drew and framed in 1855 with that style, and haven't been out of the frame since. I also drew "Alexander training the fiery war-horse Bucephalus," drawing the outlines with the eraser-pencil that I had from A. R. Dutton at the time, and doing the rest with a pen, to use as a specimen in getting up classes.

Cr.-int. 46. Who unpacked Exhibit G after it was packed, in 1861, at Augusta?

Ans. I have opened the box a great many times to give my children pens and pen-holders. I had more than a hundred when I closed my last school. When they wanted a pen or pen-holder I would go and get them two or three at any time.

Cr.-int. 47. Did you take Exhibit G with you while in the Army?

A. I did not.

Cr.-int. 48. In whose possession was it while you were absent?

Ans. I left it at home in Augusta. I was keeping house at the time.

Cr.-int. 49. Where did you obtain it in order to produce it at this examination?

Ans. When my wife moved here, November 23rd, she left a part of my things in Augusta, Me. About ten days ago I sent for one
372 box that contained my papers, such as accounts, receipt-books, medicines, and the like, that was packed in one box by my wife when she moved; and I found among those things that I received Exhibit G, as I had told Mr. Thacher that I believed I had one among my things when I packed them up or put them away.

Cr.-int. 50. What is the last time you remember to have seen Exhibit G yourself previous to the occasion you have just mentioned?

Ans. I may have seen it a half a dozen times since 1861, but have had no occasion to use anything of the kind since I quit teaching, in 1861. I've given no attention to writing, card-marking, or anything of the kind since 1861.

Cr.-int. 51. Do you remember any particular occasion besides that testified to by you when you saw Exhibit G since 1861?

Ans. No; I do not, distinctly.

S. C. THOMAS.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER. }

The deposition of ALVIN R. DUNTON, taken on behalf of the defendant, before Frederic Dodge, notary public, and special examiner of said court, at Boston, in the district of Massachusetts, on Thursday, March 6th, 1873; Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for the complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

373 Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. State your name, residence, and occupation.

Ans. Alvin R. Dunton, 14 Tremont street, Boston, author of "System of Penmanship," and I generally put down in the directory artist-penman. I am a teacher of penmanship and drawing.

Int. 2. How long have you practised that profession; where, and in what various capacities?

Ans. I commenced that business in 1835. The first school that I taught was in Lowell, Mass; after that I went to Maine, to Bucksport and Orland, and most of the adjoining towns of any note in that vicinity. From there to Hope, Me.; taught there, Lincolnville, and all the adjoining towns of any note, including Camden and Belfast. From there to Bangor; taught there for about a year, I think—about there, mostly in Bangor. From Bangor to Lowell again. I remained in Lowell until 1839, when I came to Boston. I taught here; put my specimens in the mechanics' fair held here in 1840 or 1841—I forget now—and took the first premium for the best mercantile penmanship. Some time in 1842—the spring, I think, of 1842—I went to Maine again, taught in my own native place, Rockland, and all the vicinity, Thomaston, Warren, and all about there; went to Bangor, taught in the schools, and taught the teachers there that summer. In the fall went to New Orleans, remained there, and got up a system of penmanship there in the winter of 1843. Went up in the summer, in the month of June, up the river, and taught in different towns on the Mississippi River; I went up to Galena, taught in Galena, Dubuque, and all through that section of the country; Wisconsin, Illinois, Iowa—I have taught in all those States, in all the large places. Returned to Boston, taught here; went to Maine again, taught through quite a section of Maine. I was employed here in Boston—employed by the school-committee—to teach in the Latin school, and gave lessons at different times to the teachers of the different schools.

374 Have taught in Connecticut, was employed by the school-superintendent to teach in normal schools, and taught in Brooklyn, New York, the teachers and public schools; and also in the normal school in New York City; and the teachers' institute in Maine, and also schools and institutions in different parts of the country.

Have published and republished my system of writing and copy-books at different times; also charts, and two books on punctuation.

Int. 3. To what extent have you been familiar with the different kinds of pens, pencils, and instruments used in writing and drawing during said period?

Ans. I have taken pains to try everything of the kind that I could find in the market, and have used about everything that I could get hold of that could be used in that way, either for writing or drawing, and have manufactured pencils at different times since 1837 or 1838.

Int. 4. When did you first see a pencil having combined with it, in the same implement, an eraser?

Ans. In the spring of 1852.

Int. 5. Please describe the first one that you saw, and state where and how you came to see it.

Ans. Well, the first one that I used was like defendant's Exhibit D. I made it, as I was getting up some capitals. I had been using rubber. I struck the capitals large with red chalk, and when I got them too large I used the eraser, with a piece of paper as a guide, to reduce the edges. I will state that the first one that I remember of ever making was at Lawyer Chandler's, in Chelsea.

Int. 6. Is defendant's Exhibit D one of those original pencil-erasers which you have described as first made by you?

Ans. It looks to me like the same one I used first, but I couldn't swear positively; it has the appearance of it. It would be a hard thing to tell, it has been out of my possession so long.

Int. 7. Where did this Exhibit D come from?

Ans. It was brought to me by Mrs. Pendleton, of South Boston, who has already testified in this case.

375 Int. 8. When was it brought to you?

Ans. A few days ago.

(Exhibit D, already identified and marked, is now offered in evidence by defendant's counsel.)

Int. 9. What, if any, was the next kind of said pencil-eraser which you saw; and when was it, and who made it?

Ans. Well, I made a number at that time of different kinds. I had something similar to that, and think I made it at that time. I know I made it, and had it at the same time I had Exhibit D.

(The pencil-eraser referred to by witness in this interrogatory is here produced, marked, and identified by the magistrate as "Defendant's Exhibit H.")

The same spring I commenced getting up a new series of books—the spring of 1852. I wrote a series of copies, and a man by the name of Webster cut them. I wrote the copies with red chalk dissolved in water, and wrote them with pen and this ink, and I had the engraver cut as exact a fac-simile as could be cut from my handwriting. I was obliged, oftentimes—I would get a mark too large or the spacing not exactly accurate—I would use this, as I found Exhibit D and that one (Exhibit H) were too large for fine copies, though they answered for some purposes. I was a good deal annoyed and bothered about striking and taking off other letters with the points—any points I could get. There was something else offered itself. I saw a cedar pencil that had been stepped on, and the lead was bare in the groove. That suggested the idea to put in a piece of rubber, which I did, and either stuck it together with mucilage or glue, I can't say which. I now produce a pencil like those I then made; it is an original, and was made I don't know how long ago, but as long as 1855 or 1856. I made it. I made many pencils, at different times, of a similar kind to this, while getting up those books—like Exhibit E. It was in the spring of 1852.

376 (Defendant's Exhibit E, previously marked and identified, is here offered in evidence by defendant's counsel.)

I would put them in, try them, and then, whenever I found a piece of rubber that would work well, I would split a pencil, take out a piece of lead and put it in, and make others. I made this, which is an original pencil made by me, and which I now produce. I made that as far back as 1852 or 1853.

(Defendant's counsel offers the last-named pencil-eraser in evidence, which is identified and marked by the magistrate "Defendant's Exhibit I.")

I had about the same time a pencil that I made, similar to that which I now produce, the metal'ic tube o' which was a part of one of Gillott's pens.

(Defendant's counsel offer in evidence the pencil-eraser here referred to, which is identified and marked by the magistrate "Defendant's Exhibit K.")

The examination of this witness is now, 5.40 p. m., *now* adjourned by agreement of counsel until 9.30 a. m. on Friday, March 7th.

FRIDAY, *March 7th.*—The examination of the above witness is continued, as follows:

Int. 10. Please look at defendant's Exhibit I, and state where you found it.

Ans. I left some things at Mrs. Thomas', I think, in 1855 or 1856, and I wrote her a letter to overhaul those things and see what she could find in the way of pencils, and, if she could find anything in the way of rubber, to send them. That's in Camden, Me.; Mrs. Rachel B. Thomas'. She enclosed that in a letter and sent it.

Int. 11. Did you recognise it as ever having before seen it?

Ans. Well, it looked very natural to me when I saw it.

Int. 12. After the time when you first made pencils like Exhibit
377 I, in 1852, did you make any others like that exhibit?

(Objected to as leading.)

Ans. I did make one more, if not two; but one I am sure of.

Int. 13. How long did you continue to use those like Exhibit I?

Ans. Well, I used them more or less from the time I first made them up to the time I was burned out. I think I had one or more in my possession then. I was burned out in the big fire we had here last November, at 214 Washington street; that was my room—my place of business. I had the whole floor.

Int. 14. Where did you last find defendant's Exhibit E?

Ans. At Camden, Maine.

Int. 15. How did it happen to be there?

Ans. I left it there.

Int. 16. When.

Ans. I think it was in 1856—in the fall of 1856.

Int. 17. When did you find it there?

Ans. Well, some months ago, I couldn't tell the date. I went there myself and found it. Mrs. Thomas gave it to me.

Int. 18. Are you now able to produce any more of the original pencil-erasers which you made and used like these Exhibits E and I, and like the other exhibits, than those which you have now produced? And if not, state why you are not able to.

Ans. Well, not now, here at this minute. I haven't had time to look after them to any extent; and I had similar ones when I was burned out at the fire in November last, which were burned up. My trunks were burned up, and other effects.

Int. 19. After you first made and used the pencil-eraser, Exhibit E, in the spring of 1852, did you continue to make and use such pencil-erasers in your business; and, if so, up to what time, and how many?

(Objected to as leading.)

378 Ans. Well, I made similar ones as I would lose similar ones; as they were taken from my room, or I would leave them somewhere, and I would make another one. I generally kept one or two on hand up to the time I was burned out, as I have previously stated.

Int. 20. You have specified your new series of copy-books, which you got up in 1852, as being work for which you used these pencil-erasers, Exhibit E and I, and like those exhibits, in addition to Exhibit D. Are you able to produce one of those original copy-books, published in 1852, in the preparation of which you used pencil-erasers like said exhibits, as you have testified?

Ans. I am, and do now produce it.

(The copy-book produced and referred to by the witness in this answer is here offered in evidence by defendant's counsel, and has been identified, and marked by the magistrate "Defendant's Exhibit L.")

Int. 21. Are you able to produce any copy-books subsequently got up by you, in preparation of which you used said pencil-erasers, Exhibits E and I, or pencil-erasers like them?

Ans. I am, and produce them here. I produce two now, published in

1855; there was one published in 1853, which I have not here. I think it was published in 1853. I am not positive. I used these pencil-erasers, or similar ones, on these books, and have always used them on all the books I have gotten up.

(The two copy-books produced and referred to by the witness in this answer are here offered in evidence by the defendant's counsel, and have been identified and marked by the magistrate "Defendant's Exhibits M and N.")

Int. 22. You have mentioned using these pencil-erasers, Exhibits E and I, and pencil-erasers like them, in getting up charts. Are you able to produce any of those original charts?

379 Ans. I used only Exhibits D and I in preparing charts, and not Exhibit E. I produce one of the original charts; it was published in 1852.

(The chart produced and referred to by the witness in this answer is offered in evidence by the defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit O.")

Int. 23. Were you present and did you hear the testimony given by Mrs. Lavinia B. Pendleton and Mrs. Octavia O. Sprague in this case?

Ans. I couldn't say I was present all the time; I was here most of the time, I think. I was here during all the examination of Mrs. Sprague, and during most of the examination of Mrs. Pendleton, including all her cross-examination.

Int. 24. Did you hear the testimony of Mrs. Pendleton and Mrs. Sprague as to what occurred when you visited them in May, 1852, as testified to by them?

Ans. I did.

Int. 25. How does their testimony as to that agree with your own recollection?

(Objected to as to form and substance.)

Ans. Well, it agrees in the main.

Int. 26. How did you make that pencil-eraser at Mrs. Pendleton's house?

Ans. I have the impression that I took my knife and cut down to the lead and split a piece off, instead of splitting the pencil clear down. That is where I differ from her recollection. I cut in about two inches from the end—I sometimes cut in an inch, sometimes two inches, and sometimes three—I took the lead out that was exposed, and I cut a piece of rubber and put it in, and they tied it—tied this piece of wood that I cut off; they put a little piece of thread around it and tied it down. Whether or not I cut in a little groove I can't say; it was tied at both ends of the piece that was taken out. I don't remember as

380 to the groove; I can't say, because I don't remember.

Int. 27. What do you mean by saying "I have the impression?"

Ans. I don't mean to be understood that I have the impression that I cut it down, because I know that I did—that part of it.

Int. 28. Do you, or not, distinctly recollect making the said pencil at that time as you have testified you made it?

(Objected to as leading.)

Ans. I do.

Int. 29. Do you, or not, remember using the said pencil-eraser, which you then so made, as they have testified you used it?

(Objected to as leading.)

Ans. I do.

Int. 30. You have said that you conceived the idea of making a pen-

cil-eraser like Exhibit E from seeing a pencil which had been split open by being stepped on, or otherwise, in the spring of 1852. State how long, to the best of your recollection, that was before you made the said pencil-eraser in May, 1852, at the house of Mrs. Pendleton.

(Objected to as assuming what has not been stated by the witness. The answer to interrogatory 9 to this witness is here read over to the witness by defendant's counsel.)

Ans. It was not long before; I can't say; not far from the same time; a short time previous.

Int. 31. State the various places in which you have used in your business the pencil-erasers like Exhibit E.

Ans. It would be pretty hard. I used them in Maine. I had one I used in the institutes in the State of Maine. I used them here
381 in Boston, and all the way along, while I was getting up books. I also had one or two with me in all the counties in the State of Maine, and occasionally used them. I've had occasion to use them in various places in other States, when I've been teaching in the institutes. In Connecticut I had one—one or more; I did use them there.

Int. 32. Did you ever make any pencil-erasers like Exhibit E in a manner in any respect different from that which you have described? And if so, please state the difference.

Ans. Well, I've taken a pencil like this Exhibit E; I've inserted the knife here at the point where it was glued; I split it up a piece, *taken* the lead out, and inserted a piece of rubber, and stuck it down with whatever I happened to have; anything that would hold; anything that would stick it. I also have made them in pencils where there was only lead in one end, and I've cut a groove where I wanted one larger, taken off a piece and made the groove larger than the lead; put a piece of rubber in; stuck the piece on. I've made them that way two or three times. I mean that I cut down two or three inches from the end, split off the piece, and cut my groove.

Int. 33. State in what places you have used in your business pencil-erasers like Exhibit I.

Ans. Used them in Boston and also in Chelsea, Mass. I think I have used—I know in particular that I have used them and had the rubber come out, and put it in again, several times—one pencil—the rubber would get short and I'd have to put it in again. I think I had one that I used in Maine; don't know whether I did or not. I recollect using it once. I recollect of using it in Rockland, Maine, as I was making a drawing. I don't know as I could state any other places. I've no doubt I did; but I can't state.

Int. 34. How long was it after you first made such pencil-erasers as Exhibit I that you so used them in those places?

Ans. In Boston, as near as my recollection serves me, I used
382 it right off—soon as I made it. Well, I used it in other places when I had occasion, but I had a smaller pencil. I used it in 1855 and 1856 in other places.

Int. 35. How many pencil-erasers like Exhibit E have you made yourself?

Ans. Well, I made a number. I want to qualify that a little. I mean, when I speak like that, I wish to be understood by saying "like" where there was a piece of rubber with a groove cut or the lead was taken out; also that includes the splitting and all.

Int. 36. State whether you made few or many of these, as near as you can.

Ans. I didn't make a great many of them; I made a number.

Int. 37. Did you keep yourself, and use, all that you made?

Ans. I may have used all I made, but I didn't keep them. I disposed of some.

Int. 38. Please state, as far as you can now recollect, to whom you disposed of any of them, and when.

Ans. It is hard to give the names. I know I let a man have one that was an engineer, for fine drawing. That was, I think, some time in the summer of 1852, either in 1852 or 1853. It was at Mr. Cotton's artist-furnishing store, in Tremont street, Boston; do not know his name. He might have told me his name, but I've forgot it. There was a man that I used to buy pens of *f*, a great many of Gillot's pens. I used to exchange my styles that I had manufactured for pens, and had one of those pencils, and the only one that I had at the time, like Exhibit E. That was at 228 Washington street. That was in 1852 or 1853. I couldn't state definite, but as near as my recollection would admit, he saw one, picked it up, and asked me to let him have it, as he took it. I told him it was the only one I had, and he could make one; think I told him how he might make one; but after he was gone I missed this pencil. He said he was going to Lowell, and it rather vexed me. His business was selling pens mostly; had sold him styles as far back as 1849. He had no regular place of business that I know of. He was a foreigner;
383 told me he was from either New York or Philadelphia; don't know which one of these cities. I got that impression. I think he said he had a place in both cities. Never saw my pencil again. I can't name any one except Mr. Thomas, Dr. Silas C. Thomas, to whom I disposed of any others; but I know he had two; one was that kind, and the other was a different kind.

There was another man to whom I disposed of one that I remember—James V. R. Chapman. He was connected with me at the time in this city; that was when we were getting up the specimens for the mechanics' fair, in the spring of 1856.

I lost some in the course of going round; don't know what became of them. It is a common thing for me to leave pencils or a man to put one in his pocket.

I remember also Maxcy R. Gushee, teacher of penmanship in the town of Orono, Maine, while I was teaching in Maine, to whom I disposed of one; that was in 1856; am very sure it was in the fall of 1856. I was teaching there, but don't know whether it was then or after—in 1856 or 1857; am sure he was teaching in Orono, writing and drawing.

Do not remember now the names of any others to whom I disposed of pencil-erasers; still I've no doubt I could find them—find those who have had them.

Int. 39. Have you read the depositions of Silas C. Thomas and of Chas. A. Evans, taken on this examination in this cause, or heard them testify?

Ans. In part.

Int. 40. Have you so far as their statements as to what occurred between them and you in relation to the pencil-erasers like Exhibit E?

Ans. I haven't read Mr. Evans' testimony there in regard to that pencil; Mr. Thomas' I have.

Int. 41. How does Mr. Thomas' testimony in this respect agree with your own recollection?

(Objected to for form and substance.)

Ans. Well, it agrees in the main.

384 Int. 42. Did you ever have any work done for you by said

Charles A. Evans? and, if so, state what, when, and where, as nearly as you can.

Ans. I have had work done by him. It was—I used to be troubled about getting good handsome books, and he printed some nice books for me—writing-books—in 1855; such books as those—advanced books—books published the same time as those were—advanced books.

(Exhibits M and N, shown the witness by defendant's counsel, are the books referred to.)

(The magistrate is here requested by the counsel for the complainant to state, under the 67th rule, that before the witness identified Exhibits M and N, as stated in the last clause of his answer, the defendant's counsel showed said exhibits to the witness, and said in substance, "These are the books, aren't they?" The magistrate hereby certifies that the defendant's counsel showed said exhibits to the witness, and used in substance the above words, as he understood them.)

Int. 43. Did anything occur between you and Mr. Evans at that time in relation to a pencil-eraser like Exhibit E; and, if so, what?

Ans. There did. While he was to work on the books I had to wait for them. It would take a little while—ten to twenty-five minutes—to get what I wanted. I was employing my time writing and drawing for him—something for him and others in the office. This drawing was sometimes on cards, sometimes on paper. As I was quite apt to do, I left my pencils; don't know whether I left one or two; couldn't tell. I generally carried them with me—three or four of them. I recollect his speaking to me about the pencil and my explaining the use of it, showing some of my Bristol-board cards, scroll-work, and flowers—what I used it for. It was a similar cedar pencil with a piece of rubber in it, similar to Exhibit E; and I have also had them sometimes with styles instead of lead.

Int. 44. Did any one ever make one of these pencil-erasers like Exhibit E for you; and, if so, who, and when?

385 Ans. I can't say positively. It is my impression that the man that made my styles, Rufus Cummings—he made a great many styles, I made some, and other parties made them—made me two or three. He said he had a better process of cutting rubber than I did. I know that conversation took place between us. Don't know whether he made any; am of the impression he did.

Int. 45. Did said Cummings ever have any of said pencil-erasers like Exhibit E, which were made by you, to your knowledge?

Ans. I know that he had one of those pencils, as he did a good deal of nice work drawing. Whether he made it or I made it myself I can't say. I think it likely he made it, as he knew all my secrets; knew we had a certain secret about these pencils; I mean about the other style of pencils, the styles such as he used to make. There were only two or three of us at the time, that I knew anything about, that knew anything about making these pencils; I mean styles, a composition of lead and other metals.

Int. 46. When was it that said Cummings had and used in his business one of these pencil-erasers like Exhibit E, as you have stated?

Ans. I think it was while, at any rate, that I was at 228 Washington street; and I was there from the spring of 1852 to the spring of 1854. I left there in the spring or summer of 1854.

Int. 47. Are you able to produce, and, if so, please do so, one of your styles to which you have referred in your answer to the 43d direct int.?

(The style referred to and produced is offered in evidence by defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit P.")

Int. 37. Did you keep yourself, and use, all that you made?

Ans. I may have used all I made, but I didn't keep them. I disposed of some.

Int. 38. Please state, as far as you can now recollect, to whom you disposed of any of them, and when.

Ans. It is hard to give the names. I know I let a man have one that was an engineer, for fine drawing. That was, I think, some time in the summer of 1852, either in 1852 or 1853. It was at Mr. Cotton's artist-furnishing store, in Tremont street, Boston; do not know his name. He might have told me his name, but I've forgot it. There was a man that I used to buy pens of *f*, a great many of Gillot's pens. I used to exchange my styles that I had manufactured for pens, and had one of those pencils, and the only one that I had at the time, like Exhibit E. That was at 228 Washington street. That was in 1852 or 1853. I couldn't state definite, but as near as my recollection would admit, he saw one, picked it up, and asked me to let him have it, as he took it. I told him it was the only one I had, and he could make one; think I told him how he might make one; but after he was gone I missed this pencil. He said he was going to Lowell, and it rather vexed me. His business was selling pens mostly; had sold him styles as far back as 1849. He had no regular place of business that I know of. He was a foreigner;
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I lost some in the course of going round; don't know what became of them. It is a common thing for me to leave pencils or a man to put one in his pocket.

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Ans. I have had work done by him. It was—I used to be troubled about getting good handsome books, and he printed some nice books for me—writing-books—in 1855; such books as those—advanced books—books published the same time as those were—advanced books.

(Exhibits M and N, shown the witness by defendant's counsel, are the books referred to.)

(The magistrate is here requested by the counsel for the complainant to state, under the 67th rule, that before the witness identified Exhibits M and N, as stated in the last clause of his answer, the defendant's counsel showed said exhibits to the witness, and said in substance, "These are the books, aren't they?" The magistrate hereby certifies that the defendant's counsel showed said exhibits to the witness, and used in substance the above words, as he understood them.)

Int. 43. Did anything occur between you and Mr. Evans at that time in relation to a pencil-eraser like Exhibit E; and, if so, what?

Ans. There did. While he was to work on the books I had to wait for them. It would take a little while—ten to twenty-five minutes—to get what I wanted. I was employing my time writing and drawing for him—something for him and others in the office. This drawing was sometimes on cards, sometimes on paper. As I was quite apt to do, I left my pencils; don't know whether I left one or two; couldn't tell. I generally carried them with me—three or four of them. I recollect his speaking to me about the pencil and my explaining the use of it, showing some of my Bristol-board cards, scroll-work, and flowers—what I used it for. It was a similar cedar pencil with a piece of rubber in it, similar to Exhibit E; and I have also had them sometimes with styles instead of lead.

Int. 44. Did any one ever make one of these pencil-erasers like Exhibit E for you; and, if so, who, and when?

385 Ans. I can't say positively. It is my impression that the man that made my styles, Rufus Cummings—he made a great many styles, I made some, and other parties made them—made me two or three. He said he had a better process of cutting rubber than I did. I know that conversation took place between us. Don't know whether he made any; am of the impression he did.

Int. 45. Did said Cummings ever have any of said pencil-erasers like Exhibit E, which were made by you, to your knowledge?

Ans. I know that he had one of those pencils, as he did a good deal of nice work drawing. Whether he made it or I made it myself I can't say. I think it likely he made it, as he knew all my secrets; knew we had a certain secret about these pencils; I mean about the other style of pencils, the styles such as he used to make. There were only two or three of us at the time, that I knew anything about, that knew anything about making these pencils; I mean styles, a composition of lead and other metals.

Int. 46. When was it that said Cummings had and used in his business one of these pencil-erasers like Exhibit E, as you have stated?

Ans. I think it was while, at any rate, that I was at 228 Washington street; and I was there from the spring of 1852 to the spring of 1854. I left there in the spring or summer of 1854.

Int. 47. Are you able to produce, and, if so, please do so, one of your styles to which you have referred in your answer to the 43d direct int.?

(The style referred to and produced is offered in evidence by defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit P.")

Int. 48. To what extent, if at all, was your use of the pencil-erasers like Exhibit E and Exhibit I and the said pencil-erasers themselves, open to the observation and examination of other persons?

(Objected to as leading.)

386 Ans. They were lying round on my desk, or in an open box, a pen-handle box, the same as my pens or other pencils were round, but not to the same extent, as there were less of them. My desk was in the rooms where I was doing business, 228 Washington street and School street, also at 114 Washington street, and at other places where I have been travelling in my rooms where I stopped and where I was teaching.

Int. 49. Did you or not, and to what extent, use them in the presence of other persons, and, if so, who?

Ans. Well, I used them to some extent. As I said before, I'm very forgetful about names—giving names. I have used them in that way.

Int. 50. Was or not your use of them open to observation of your pupils in your various schools?

Ans. To some extent.

Int. 51. To how many persons have you shown and explained your method of making and using your pencil-erasers like Exhibits E and I other than those you have already mentioned, between your first making them and 1857?

Ans. I couldn't say; couldn't give any sort of an estimate of that; couldn't tell about it. I know that I have talked with individuals about that; couldn't say how many; suppose I could hunt up plenty of them if I had time.

A. R. DUNTON.

The cross-examination of the above witness, A. R. Dunton, is postponed for thirty days, by agreement of counsel; and it is further agreed by them that the defendant may amend his answer by inserting the names of the witnesses examined and to be examined at these sittings, including that of said witness Dunton.

The plaintiff's counsel give notice upon the record that at the cross-examination of said witness Dunton they will call for the production of such exhibits as are referred to by him in the course of his testimony, and as were exhibited to him by the defendant's counsel during his examination.

387 It is further agreed by said counsel that if the complainants fail to appear and proceed with the cross-examination of said witness, A. R. Dunton, on or before the 8th day of April, 1873, at eleven o'clock a. m., then said deposition shall be closed and duly filed in this cause as testimony in behalf of said defendant.

F. DODGE,
Notary Public and Examiner.

On Friday, April 8th, in pursuance of the above agreement of counsel, the examination of the witness Dunton is continued as follows:

Further direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 52. Are you able to produce a specimen of the soft rubber, such as you used in some of the pencil-erasers which you have testified to making and using, similar to Exhibit E?

Ans. That is not the kind that I used in E; that is a white rubber. I used that style of rubber in some cases.

(The piece of rubber referred to in the above answer by the witness is produced by him, offered in evidence by defendant's counsel, marked for identification, by the magistrate, "Defendant's Exhibit B B, April 8, 1873.")

Int. 53. Are you now able to produce any pencil-erasers having lead in one end and eraser in the other end other than those you have already produced, which were made and used by you in your business?

Ans. I am, and do now produce them.

Int. 54. Please look at the one now shown you, of these which you now produce, and state for how long and up to what time you used it in your business?

Ans. This was made some time in 1869 or 1870, I think; in the last part of 1870, at any rate when I got up my charts, the last ones;
388 well, I used it in 1871, as far as 1872; well, I had it on hand at the time I was burned out.

(The pencil-eraser produced and referred to by the witness in answer to the last two interrogatories is offered in evidence by defendant's counsel, and has been marked for identification, by the magistrate, "Defendant's Exhibit C C.")

Int. 55. Please look at this one now shown you of those which you produced in answer to int. 53, and state for how long and up to what time you used it in your business.

Ans. I couldn't tell when that was made exactly; it was among my things when I was burned out, and saved among some other things.

(The pencil-eraser produced and referred to by the witness in answer to the last interrogatory and int. 53 is offered in evidence by defendant's counsel, and has been identified and marked, by the magistrate, "Defendant's Exhibit D D.")

Int. 56. Please look at this one now shown you of those which you produced in answer to int. 53, and state for how long, and up to what time, you used it in your business.

Ans. I used it about the same time as I used this one, (defendant's Exhibit C C;) I had it at the time I was burned out, as it was with others in my room.

(The pencil-eraser produced and referred to by the witness in answer to the last interrogatory and int. 53 is offered in evidence by defendant's counsel, and has been identified and marked, by the magistrate, "Defendant's Exhibit E E.")

Int. 57. Please look at this one now shown you of those which you produced in answer to int. 53, and state for how long, and up to what time, you used it in your business, and what you did with it.

389 Ans. This was made a year ago this winter, and disposed of to Mr. Gushee, Samuel M. or R. Gushee, now of Norton, Mass., by me a year ago this winter; he used it in my room for some time, getting up specimens; that has ink-rubber in it.

(The pencil-eraser produced and referred to by the witness in answer to the last interrogatory and int. 53 is offered in evidence by defendant's counsel, and has been identified and marked, by them agistrate, "Defendant's Exhibits F F.")

Int. 58. Why did you not produce these four pencil-erasers Exhibits C C, D D, E E, and F F, on your previous examination?

Ans. I did not know where they were.

Int. 59. Where have you since found them?

Ans. Those with other pencils and pen-holders and many other brushes were rolled up and put into diplomas inside, parchment and paper

diplomas, city schools, the night of the fire; this roll with two or three more was carried across the street into a photographer's opposite my place and remained there for quite a time—length of time.

Int. 60. Was there any other pencil-eraser like Exhibit E among these so saved from the fire than these four which you have now produced; and, if so, what has become of it?

Ans. There was one, it's in the hands—I gave it to Mr. Sawyer; I don't know his whole name; his college, mercantile college, is, I think, 163, I couldn't say exactly, on Tremont street.

Int. 61. Of the pencil-erasers like Exhibit E and like those other similar pencil-erasers which you have produced, which you made and had in use in your business prior to and up to the time of the fire, did you save any others from the fire?

(Objected to as *as* assuming that there were other pencil-erasers prior to the fire. Question withdrawn.)

390 Int. 62. Did you have any other pencil-erasers like Exhibit E at your rooms and in use in your business, prior and up to the fire, besides these which were saved?

Ans. As near as my recollection serves me I had others.

Int. 63. Of the pencil-erasers like Exhibit E, and like these other similar pencil-erasers which you have produced, which you made and had in use in your business prior to and up to the time of the fire, did you save any others from the fire?

Ans. These are all the pencils of this kind that I saved.

Cross-examination of this witness is postponed for the present by agreement of counsel.

On Wednesday, April 9th, at 3.45 o'clock p. m., the examination of this witness is, by agreement, further continued as follows:

Direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 64. Are you acquainted with Charles French, who has testified here yesterday and to-day, and did you hear his testimony?

Ans. I am acquainted with him; I also heard his testimony.

Int. 65. Do you remember having and using pencil-erasers like Exhibit E, at his rooms, as testified by him?

Ans. I do.

Int. 66. When did you commence so using those pencil-erasers there, and how long did the same continue?

Ans. In 1852; up to 1857.

Int. 67. Do you know Mr. George A. Sawyer, who was examined as a witness here yesterday and to-day, and did you hear his testimony?

Ans. I know him and heard his testimony.

Int. 68. Do you remember having and using your said pencil-erasers like Exhibit E at his rooms 94 Tremont street, after he took them from Charles French, as testified to by said Sawyer; and, if so, how long did you continue to do so?

391 Ans. I recollect using them; the first time was taking Charles French's name out of a specimen and putting in Mr. Sawyer's; pencilled it in and then trued it up; up to September, 1858; at different times.

Int. 69. Where did you go in September, 1858?

Ans. I was employed by the superintendent of public schools at Toledo, Ohio, to teach in the schools; I introduced my books.

Int. 70. After September, 1858, for how long a time were you absent from the city of Boston as a place of residence?

Ans. Up to 1870.

Int. 71. Between September, 1858, and 1870, did you have and use your said pencil-erasers in any rooms or school occupied or carried on by said Charles French, in the city of Boston?

Ans. Not to the best of my recollection.

Int. 72. Do you know and have you heard the testimony of Samuel W. Gushee and Francis H. Hale here to-day?

Ans. I know them both and have heard their testimony.

Int. 73. Do you recollect showing them the said pencil-erasers like Exhibit E, and making one of them for said Gushee, as testified to by them respectively?

Ans. I do.

Cross-interrogatories by Mr. Blake, for complainant, and answers of the witness thereto:

Cr.-int. 1. How old are you?

Ans. Sixty years; shall be the 30th day of this month.

Cr. 2. Where were you born?

Ans. In the town of Hope, State of Maine.

Cr.-int. 2. How much of your life have you given to teaching and practising penmanship?

Ans. Most of the time, when I was able to work, since 1835.

Cr.-int. 4. Have you followed any other pursuits; if so, what?

392 Ans. I don't know of any other.

Cr.-int. 5. Are you acquainted with any other art or arts than the art of penmanship; and, if yea, what?

Ans. I am acquainted with drawing, pencil-drawing and pen-drawing.

Cr.-int. 6. Any other?

Ans. Not that I recollect.

Cr.-int. 7. Are you skillful at sleight of hand?

Ans. I have played that as a pastime, merely as a man would sing a song.

Cr.-int. 8. Then, I understand you to say that since the year 1845 you have practiced no other employment for gain than penmanship and the kindred arts that you have mentioned. Is that so?

Ans. According to the best of my recollection it is.

Cr.-int. 9. And you have practised these without substantial interruption?

Ans. I have been sick a great deal, three or four years that I wasn't able to do anything at all, not to take a pen or pencil in hand; hardly write my name, or anything of that kind.

Cr.-int. 10. Was this one illness, or many? Give us the dates and duration thereof, if you please, also its nature.

Ans. Well, I was taken sick at Tecumseh, in Michigan; sick there all winter, and sick, in fact, in Tecumseh, I think, in the winter of 1868, and I was sick from that time up to 1863; was employed to teach in the institute in Michigan, at a place called Ypsilanti, and went from there to somewhere in Michigan to an institute; set out to teach, gave one lesson, and was taken down sick; don't remember the town at this distance of time; I went to Pontiac, an appropriation was made there to teach in the schools; my wife was with me, and she and Mr. West who was with me did most of the teaching; I was not able to go out; I rode out once or twice and may have gone into the schools once or twice; think that I did; I had doctors examine me there and they pronounced my case incurable; they went so far as

to say that I'd never live to see the roses come out in the spring; from there I went to Flint and an appropriation was made there; my
393 wife and Mr. Nelson West did most of the teaching, and I put myself under the treatment of a Dr. Stone; went to his house and staid there. I got a little better under his treatment, and went from there to East Saginaw; an appropriation was made there; Mr. West went also, and Mrs. Dunton. I grew sicker, and came back to Dr. Stone's and remained there some months; don't know how long. I didn't get any letter; got discouraged and thought I'd come to Boston; went as far as Detroit, and there fell in with a doctor who gave what he called steam medicated baths; don't recollect his name, but he said he could tell whether I could be cured or not by giving me two or three of those medicated baths; he could tell whether or not it would do to go on; he gave me two and did not want to give me the third. I was anxious to take another one and he was lo'th to give it; while in there I had a congestion of the brain, of which he was fearful; he pronounced my case incurable. I came on then to see a former partner of mine, and came by the way of Niagara Falls; there I had another severe attack, and a physician told Mrs. Dunton she had better take me among my friends, if I had any. I came on and stopped with Mr. Chapman's family; he'd been formerly a partner of mine; he lived in Rochester; they doctored me, treated me very kindly. I got some better and we went to Palmyra, N. Y.; Mr. Chapman went and got up the school; he said I wasn't able to go, and Mrs. Dunton might do the teaching. I went, was confined to my bed most of the time, wasn't able to go into the school. I came back to Mr. Chapman's again. I wanted a situation to teach; he and the family tried to discourage me from ever attempting it again, but through him and some persons anxious to have me go I agreed to go to Rockport, a place at some distance, if Mr. Chapman would go and get up the school for me; wasn't able to get it up myself. I went there, he didn't come. I went round drawing, in stores, &c., trying to get up my school; it was in the fall of the year, and I brought on my sickness again, and I was in a situation that
394 I was not able to know what I did do; expected him every day; he didn't come. I got cold and had a good deal of trouble; was under the doctor's care there; finally came back to Rochester and remained there all that winter at Mr. Chapman's, so sick that I wasn't able to go out all that winter, only walk to the next house a few times; Dr. Sumner, among a number of physicians, doctered me; said my case was insanity, brought on by mental overtaxing the system, and so on; my friends wanted to take me to an insane-asylum, but my wife wouldn't consent; they did start, I believe, to take me, but I finally persuaded them to let me go to a water-cure in Danville, Dr. Jackson's and Dr. Heard's. When I got there Dr. Heard examined me and said I couldn't be cured, and if any one said they could cure me they were a humbug. He said to my wife that he could patch me up some. I went from there to——. I wasn't happy there, and didn't seem to gain. I rode out to Weymouth, six or seven miles from there, and saw a man I knew; he wanted me to come and stop; Weymouth, N. Y., six miles from Danville. I gained some; used to work in the garden there. From that I went to Avon Springs, Lower Springs, and was under a doctor's care, Dr. Long, and remained there until quite late in the fall of the year; well, it was—I can't recollect now what autumn this was. I remained there till cold weather, and was recommended by the doctors to try Cuba and see if that wouldn't help me; started and got as far as Philadelphia. I fell in with a doctor there who was going to cure me, so he

said; he was Dr. Landers; went to his house and he gave me treatment there. I remained there, I think, until warm weather, and then tried another doctor; went to his house and spent the summer; his name I don't recollect at the present time. I may think of it pretty soon; he gave me but little encouragement and I didn't gain much of any. I then went to a Dr. Foster's house, in Philadelphia, and remained there for some time; after that I took rooms at 1304 Chestnut street, hired a house; had rooms fitted up for teaching penmanship and drawing, and taught; Mrs. Dunton did most of the teaching; taught in the seminaries there; was employed to teach in the Chegany Institute and the Quaker City Business College. (Question repeated.)

395 I broke down again there; left there in the spring or summer, came on here to Boston for a day or two, then went to Maine, my own native State. I can't state what year this was at present, but I could find out.

Cr.-int. 11. When the doctors in Michigan told you that you couldn't expect to see the roses again, what did they tell you was the matter with you?

Ans. Well, they seemed to think that the system was worn out, that I'd overtaxed the physical and mental system so much that the system wouldn't rally again; and with the rest a liver complaint—a complication of diseases.

The cross-examination at this point, 5.10 p. m., is by agreement of counsel adjourned until 9.30 to-morrow morning, Thursday, April 10.

Thursday, April 10th, at the above-named hour, said cross-examination is continued as follows:

Cr.-int. 12. Are you now able to fix the time when you returned to Maine from Philadelphia?

Ans. I am.

Cr.-int. 13. State when that was.

A. That was in the summer of 1868.

Cr.-int. 14. When do you consider the illness of which you have spoken, during which you were unable to work, to have ended?

Ans. In 1864 or 1865; 1864 I think.

Cr.-int. 15. Then, if I rightly understand you, you were ill from the winter of 1858 to the winter of 1864 and 1865. Is that so?

Ans. Yes. I was ill all that time. Under doctors' care all the time; different physicians.

Cr.-int. 16. Now, to go back to 1835. You have named in your direct examination various places in Maine and Massachusetts in which you taught. How long did you teach in Lowell?

Ans. Well, I think about two years. As near as I can recollect, about two years. It may be more or less.

396 Cr.-int. 17. In what school or schools?

Ans. I had the writing-academy on the corner of Merrimac street—Wyman's block, so called; I taught also in a private school in Dracut; I don't recollect the name of the principal at this time; he was a clergyman.

Cr.-int. 18. You next went to Bucksport. How long did you teach in Bucksport and vicinity?

Ans. I should like to correct that statement; I am a little mixed on that; I taught in Lowell in 1835; taught in Bucksport and Orland somewhere in 1836 or 1837, can't say exactly; taught a few schools around there; taught a number of terms in that vicinity.

Cr.-int. 19. When did you go to Hope, Me., from Bucksport?

Ans. As near as my recollection serves me, it was in 1837.

Cr.-int. 20. How long did you teach in Hope and vicinity?

Ans. I taught there a short time; I couldn't say the number of months.

Cr.-int. 21. When did you first go to Bangor?

Ans. Well, I went directly from those places; I think it must have been in 1837—latter part of 1837, I think, as near as my recollection serves me.

Cr.-int. 22. How long did you remain there?

Ans. A few months, I couldn't state; I've nothing whereby I can state if it was one month or five, at present.

Cr.-int. 23. Do you remember what schools you taught in at Bangor?

Ans. Private schools; don't know whether I taught in any others at that time; I think I did, but wouldn't say to a certainty; I taught there a number of times.

Cr.-int. 24. Where did you go from Bangor?

Ans. Went to Lowell.

Cr.-int. 25. How long were you in Lowell at that time?

Ans. Well, it was between one and two years, I think, as near as I can recollect.

Cr.-int. 26. You then came to Boston and remained till 1842?

397 Ans. I did, as near as I can recollect; I'd like to state there that I took the premium in 1841, at the Mechanics' Fair, and I know I was here before that, and I know I spent the winter here after that.

Cr.-int. 27. When did you next return to Bangor?

Ans. I think it was soon after that, as near as my recollection.

Cr.-int. 28. State as nearly as you can when you went back to Bangor, and how long a time you remained there.

Ans. I should like to correct that. I believe that instead of going to Bangor at that time, I think that I went to Hope and Union before I went to Bangor. I did, I believe—Hope, Union, Thomaston, and Rockland, and then to Bangor.

(Question repeated.)

I remained in Bangor some month or two, went to Foxcroft and Dover, employed to teach there; gave a course of lessons; that was in 1843 that I was both in Bangor and Dover. I've got hold of something now I know I'm correct on: 1843. Why I know, I took my brother to learn to write; he took lessons of me, also Mr. Payson.

Cr.-int. 29. When did you next return to Bangor?

Ans. Immediately after giving the course of lessons.

Cr.-int. 30. How long did you remain there?

Ans. A very short time.

Cr.-int. 31. During that short time did you give lessons?

Ans. I could'nt say that I did. I was out of health at that time.

Cr.-int. 32. Now, sir, during this period of time that you taught in New England, what was your success as a teacher?

Ans. Good; good success.

Cr.-int. 33. Whether your reputation and standing as a teacher of penmanship was satisfactory to you?

Ans. It was.

Cr-int. 34. How did it compare with that of others in the same branch of business?

398 Ans. I couldn't say.

Cr.-int. 35. When did you go to New Orleans?

Ans. Fall of——; late in the fall of 1843.

Cr.-int. 36. Why did you go there?

Ans. I started to go, and my brother with me, to Augusta, Me.; went to Camden, and my health being poor, I suggested to my brother there was a vessel about to sail for New Orleans; Capt. Stackpole, master; a brig; that it might be better for my health to go to New Orleans with him; accordingly went. My brother went with me.

Cr.-int. 37. Why did you leave Bangor?

Ans. I left it partly on account of poor health, and also because I was not located anywhere then. I was traveling, giving lessons; had no permanent location.

Cr.-int. 38. Was there any other reason, sir?

Ans. No other reason whatever.

Cr.-int. 39. Had you any friends at New Orleans before you went there?

Ans. I went out in company with friends, passengers going out, and I found a good many when I got there that I was acquainted with.

Cr.-int. 40. Where had you become acquainted with these people that you met in New Orleans?

Ans. Various places in Maine.

Cr.-int. 41. Before you went there, did you know that these persons were there?

Ans. I knew that some of them were there.

Cr.-int. 42. What did you do in New Orleans?

Ans. Fitted up rooms for writing purposes; during which time I gave lessons in the first and third municipalities to the sea-captains; had over a hundred of them; perhaps a hundred and thirty of them; two schools.

Cr.-int. 43. How long did you remain in New Orleans?

Ans. Remained there till June; next June. Late as October, 1843, when I left Maine; think it must have been June, 1844, when I left New Orleans.

Cr.-int. 44. Where did you go from New Orleans?

Ans. St. Louis first.

Cr.-int. 45. Did you stop in Memphis on the way?

Ans. I think not; first place was St. Louis.

399 Cr.-int. 46. How long were you going from New Orleans to St. Louis?

Ans. Can't recollect; the usual time that a steamer would be.

Cr.-int. 47. You went up on a steamer?

Ans. Yes.

Cr.-int. 48. How long did you remain at St. Louis?

Ans. A few weeks.

Cr.-int. 49. Teaching?

Ans. Selling receipes for making pencils to writing-teachers and others; did not teach.

Cr.-int. 50. Where did you go then?

Ans. I had a curiosity to see Nauvoo; had some friends there; that's the next place that I visited, if I mistake not.

Cr.-int. 51. When were you at Nauvoo?

Ans. In the summer of 1844; I know the city was under martial-law, and Joe Smith, the prophet, and Hiram was killed at that time, while I was there; that was in 1844, I believe.

Cr.-int. 52. Where did you go next?

Ans. I went, if I mistake not, to Davenport; I taught at two or three towns, different places, up the river, before I went to Galena.

Cr.-int. 53. When did you arrive at Galena?

Ans. First part of the fall or summer of 1844.

Cr.-int. 54. How long did you remain at Galena?

Ans. Long enough to give two courses of lessons.

Cr.-int. 55. Can't you tell us how long that was; whether two weeks or two months?

Ans. Well, nearer two months, as near as my recollection serves me.

Cr.-int. 56. Where did you go from Galena?

Ans. To Dubuque.

Cr.-int. 57. How long were you in Dubuque?

Ans. About the same length of time; gave two courses of lessons.

Cr.-int. 58. Where did you go from Dubuque?

Ans. Mineral Point.

400 Cr.-int. 59. How long did you remain there, and what did you do there?

Ans. I done pretty well there; remained there three weeks; cleared $750 in three weeks, clear of all expenses; teaching, writing, drawing, and selling recipes for pencils.

Cr.-int. 60. Where did you go from Mineral Point?

Ans. Plattville.

Cr.-int. 61. How long were you there?

Ans. Gave two courses of lessons there.

Cr.-int. 62. Now, about when was it, to fix a date, that you were at Plattville?

Ans. Well, according to my best recollection, it was in the winter or very late in the fall of 1844.

Cr.-int. 63. Where did you go next from Plattville; what did you do there, and how long were you there?

Ans. Went to Janesville, Wisconsin; I taught; gave two courses of lessons there; should think about four weeks.

Cr.-int. 64. Where did you go next; what did you do there, and how long were you there?

Ans. Milwaukee; gave two courses of lessons there; two months, I should think.

Cr.-int. 65. Where did you go next; what did you do there, and how long were you there?

Ans. Racine; taught two courses of lessons there; couldn't say; long enough for two courses of lessons.

Cr.-int. 66. Where did you go next; what did you do there, and how long were you there?

Ans. Southport, a short distance from Racine; gave one or two courses of lessons there; don't recollect which; two or three weeks; perhaps longer; I couldn't tell.

Cr.-int. 67. Where did you go next; what did you do there, and how long were you there?

Ans. I received a letter while I was there to go to Chicago; went through in the stage from there to Chicago, in the spring of 1845; I taught in a number of schools, seminaries; also had a private school of my own, and taught many teachers there; teachers in public
401 schools, many of them; I got up my series of copies, and they were made into book-form in New Orleans in the winter of 1843, and I introduced them into schools along as I came up, in St. Louis and other places; well, I think, as near as I can recollect, I left Chicago in the month of August, I think; that would be 1845, I believe; yes, it would be 1845; went through to Galena again.

Cr.-int. 68. How long did you then stay at Galena, and what did you do there?

Ans. Well, I gave two courses of lessons, I think; couldn't tell exactly the time I staid. I went from there to Dubuque again.

Cr.-int. 69. How long did you stay at Dubuque, and what did you do there?

Ans. I staid there about a month, I think, and made a thousand dollars in the month clear of expenses.

Cr.-int. 70. Well, where did you go next, and how long did you remain there, and what did you do?

Ans. A friend of mine came from Maine. I owned a very good saddle-horse then. I bought him one, and we traveled in the West, looking at different points; he with a view of locating, if he could find a place to suit him.

Cr.-int. 71. How long did this horseback-journey last, and where did it end?

Ans. It must have lasted two months; we started from Galena and went up the river—different points. We came back to ———; rode through back as far as Janesville; sold his horse there, and I bought a buggy, and we started for Racine.

Cr.-int. 72. Did you get there, and how long did you stay there?

Ans. I did; got there; staid there and vicinity—Southport—some weeks.

Cr.-int. 73. What were you doing there?

Ans. Hunting most of the time—killing prairie-chickens.

Cr.-int. 74. After leaving Racine where did you go; how long were you there, and what did you do there?

402 Ans. Came back to Janesville again; remained there a few days; came back to Dubuque; gave another course of lessons there, I believe, if my memory serves me right.

Cr.-int. 75. Where did you go next; how long were you there, and what did you do there?

Ans. Went to a place called Hazel Green, I think, a few miles from Galena; taught, gave a course of lessons, and I remained there some time. I had a very fast horse—running-horse—Kentucky-bred horse. I let a man take him and train him, and run him a number of races. I went out to his house; his name was Williams. He lived some distance from there, and saw him train him. He ran a number of races and won them; gave me half he made in the races. I afterwards sold him the horse. I was about there in that vicinity. I think I was there. I may get mixed up a little here. I'm very forgetful about dates; no man more so, unless I have something to refer to. I did have all these dates down before I was burned out, as I had recommendations from all the places where I've taught; from teachers, committeemen, and others. Well, I was there all summer, fall, and all winter—there and vicinity. I taught after that in the vicinity.

Cr.-int. 76. Did you attend the races which your horse won?

Ans. I did.

Cr.-int. 77. Did you play cards on the course?

(Objected to as irrelevant and immaterial.)

Ans. I did not.

Cr.-int. 78. After leaving the vicinity of Hazel Green where did you go; how long did you stay there, and what did you do there?

Ans. I taught in different places in the vicinity.

Cr.-int. 79. How long were you in the vicinity?

Ans. That, sir, is what I can't tell.

Cr.-int. 80. Give us your best estimate, sir.

Ans. Well, some weeks; how many I couldn't say.

Cr.-int. 81. On leaving this vicinity where did you go; what did you do there, and how long did you remain?

403 Ans. Came to Boston, as near as my—to the best of my recollection.

Cr.-int. 82. What did you do in Boston then?

Ans. First thing was to ride out with Mr. Josiah Goodwin, an old friend of mine; used to be a merchant here, now a broker; he lives in Brookline. I was taken sick as I was out; felt chilly, came back to the United States Hotel and put up there, and found myself very sick with fever and ague.

Cr.-int. 83. How long did you remain ill?

Ans. Six, seven, or eight months, somewhere along there.

Cr.-int. 84. Who took care of you during this illness?

Ans. A number of physicians; one homœ'pathic physician was my main doctor, don't recollect his name. I was not there all the time during my sickness. I was taken to Maine, to my brother's; how long I was there I couldn't say; in Hope, Maine.

Cr.-int. 86. On your recovery what did you do, and where did you go, if anywhere?

Ans. First place was at Rockland; taught school there.

Cr.-int. 86. How long were you there?

Ans. Not able to say.

Cr.-int. 87. Give us your best recollection.

Ans. A few weeks. I think I went to Warren, Maine.

Cr.-int. 88. How long were you there, and what did you do there?

Ans. Taught. I'm not able to tell at this time; think I can find something to show dates of a gentleman in this place who took lessons of me there.

Cr.-int. 89. Give us your best recollection as it is now, sir.

Ans. I can't tell where I did go from there now; it might strike me in ten minutes, but now I'm not able to tell. I should think it was about this season that I was there, perhaps a little earlier. I gave a course of lessons there.

Cr.-int. 90. Now try to tell us where you went from Warren?

404 Ans. I've lost the date in my mind, and I don't know where I—can't recall it.

Cr.-int. 91. Where do you next remember being?

Ans. At Mr. Chamber's, in Chelsea, Mass. I may have made a mistake about that; that's the first place I remember being at.

Cr.-int. 92. When was this, sir, to the best of your recollection?

Well, I think it was in—as near as I can recollect, some time in 1847, in the winter of 1847.

Cr.-int. 93. How long did you remain in Chelsea, and what did you do while you were there?

Ans. I taught writing and drawing. I remained long enough to teach two courses of lessons there; came to Boston and opened a school, an academy, at 5½ Tremont Row.

Cr.-int. 94. How long did you remain there?

A. I couldn't tell.

Cr.-int. 95. Give us your best recollection.

Ans. I was married during the time I was there to my first wife. I'm not able to tell that date.

Cr.-int. 96. How long did you remain in Boston at that time? Give us your best recollection.

Ans. One or two years. I can't come at that definite.

Cr.-int. 97. During these one or two years, can you tell us who you were accustomed to see in a friendly way?

Ans. Mr. Southworth—Albert Southworth—photographer, in the same building where I was; Mr. Rowe, the crayon artist; Mr. Goodwin, and many others.

Cr.-int. 98. When did you leave Boston after this year or two, and where did you go?

Ans. The legislature was in session at Augusta, Maine. I went there; taught many of the members and others; went from there to Farmington, Maine.

Cr.-int. 99. In what year was this?

Ans. That's what I want to recollect now; it was either 1849 or 1850, if my memory serves me right. From there to Skowhegan and Waterville; taught in those places.

Cr.-int. 100. How long were you at each of those places?

405 Ans. Couldn't say.

Cr.-int. 101. How many courses of lessons did you give in each of these places?

Ans. I taught in each of them; gave a course or more.

Cr. int. 102. Where did you go from Skowhegan? How long did you stay there, and what did you do there?

Ans. My wife was sick, and I came from there to Montville, Me., where she was born. I taught school there in Liberty, and Montville, and Belfast. I am able to state the date I was at 5½ Tremont Row by a date I find here. It was 1848, the fall I was married; but I was there longer than that. I think I was there, if I mistake not. It was in latter part of 1849 or 1850 that I went to Maine.

Cr.-int. 103. How long were you at Montville and Belfast?

Ans. Couldn't say.

Cr.-int. 104. Give us your best recollection.

Ans. Well, I remained there and that vicinity teaching till the spring opened; taught in Hampden and other places around there, and Mr. Scribner was at work for me at the time. My wife died while I was round there that spring, and we went to Bangor that summer.

Cr.-int. 105. How long were you at Bangor at that time; and what did you do there?

Ans. We taught in the public schools. Whether we received the pay from the students or the committee, I'm not able to say now. Taught there until the fall, till the institutes opened. Went to a town a little out of Bangor; gave some instruction; evening school and day school. Went from there to Foxcroft and Dover; gave some instruction there in the institutes, and had a very large school there, if my memory serves me right. Taught in a number of different places, and returned to Bangor, if my memory serves me right.

Cr.-int. 106. How long did you remain in Bangor this time?

I remained teaching in Bangor and vicinity, different towns around there, till the spring of 1852.

Cr.-int. 107. Where did you then go?

406 Ans. To Mrs. Pendleton's, in South Boston; also, to Mrs. . Commenced boarding at the foot of the Common, corner of Boylston and Common streets; a Mrs. Golden's.

Cr.-int. 108. Before answering the last question, did you not look at a paper or papers which you now hold in your hand?

Ans. I did not; I did not see a thing. I opened it; did not see a thing.

Cr.-int. 109. Will you let me see those papers?

A. I have private papers here, that I prefer not to let you see, in my hand.

Cr.-int. 110. Do you decline to let me see them?

Ans. I prefer not to.

Cr.-int. 111. In whose handwriting are they?

Ans. It's in my own.

Cr.-int. 112. Both of them in your own, and wholly?

Ans. They are, wholly. I'll furthermore say that there's no date on this farther back than 1852.

Cr.-int. 113. Have you just handed one of the papers in question to Mr. Washburn, counsel for defendant, and is he now reading it?

Ans. I have. He is.

Cr.-int. 114. You say that when you left Bangor you came to Mrs. Pendleton's. How did you happen to come to Mrs. Pendleton's?

(The magistrate here certifies, at the request of defendant's counsel, that the witness now hands to the complainant's counsel one of the papers referred to in cross-interrogatories 108, 109, 110, 111, 112, and 113, and the answers thereto, on condition that it be returned to him.)

Ans. I was acquainted with the family when they lived in the town of Hope, Me., and Camden. They were at Hope our nearest neighbors. Capt. Pendleton was a schoolmate of mine; an older man, however.

Cr.-int. 115. When you came to Boston, previous to this visit, had it been your habit to go and see them?

407 Ans. It was not.

Cr.-int. 116. What led you to go and see them this time?

Ans. Mr. Payson & Mr. Dunton had a writing academy in Washington street. I called there to see them, and do some work for them. Miss Pendleton, a daughter of Mrs. Pendleton, was taking lessons of them in writing. I received an invitation to go and see them; she told me where they lived.

Cr.-int. 117. Did you marry one of Mrs. Pendleton's daughters?

Ans. Married the second daughter.

Cr.-int. 118. When?

Ans. It was in the fall of 1855, if my memory serves me right.

Cr.-int. 119. You have stated that when you were in New Orleans you published a system of penmanship. Was that substantially the same as that afterwards published by you in Boston?

Ans. As far as the style of writing was concerned, movements, &c., it was; but it was not published to the extent; that is, there was not as many copies as I published afterward, but the style and manner of teaching is the same; the books were made up different; the others were narrow books.

Cr.-int. 120. Is there not a controversy going on in regard to the authorship of the Duntonian system, so called, of penmanship?

Ans. Not that I am aware of; not in that sense that you ask the question.

Cr.-int. 121. In what sense is there a controversy going on?

Ans. If I understand right, it is for ruling, imitating their style of ruling, and using words that they have used.

Cr.-int. 122. Do you mean that you are charged with imitating Payson & Dunton's method of ruling, &c.?

Ans. This suit that's pending—well, I've not seen this charge. The suit is between Woolworth & Ainsworth, of New York, and Lee
408 & Shepherd, of this place. As I understand it, the charge is for selling these books; at any rate, I'm so informed.

Cr.-int. 123. And those books are your copies, are they not?

Ans. They are my copies; I wrote them.

Cr.-int. 124. There has been a controversy between you and your brother as to the authorship of the so-called Duntonian system, has there not?

Ans. I don't know; I never heard that there was any doubt as to the authorship of that system.

Cr. int. 125. Well, sir, there has been a controversy of some kind between yourself and Dunton & Payson, has there not?

Ans. That's the brother of mine, that man. I would state that he never taught penmanship till 1843. I gave him lessons and qualified him so that he taught after that, but he never claimed to be the author of a system. There has been a controversy.

Cr.-int. 126. In the course of that controversy you printed a pamphlet, did you not?

Ans. I printed two or three pamphlets and large circulars.

Cr.-int. 127. When did you print the first one and when the last?

Ans. I couldn't say when the first one was printed; it was before this which I hold in my hand, and they answered it. I then published this, and they never have answered it. I published this in August, 1858.

Cr.-int. 128. Please look on page 53 of that pamphlet, and state whether you don't think it must have been published after March 2d, 1859?

Ans. Well, I go according to this: I took the date of this piece that was out; that was put in here. I don't exactly account for that, unless that was put in here afterwards.

Cr.-int. 129. Is there not an appendix to the pamphlet, and does not that appendix contain an extract from the Boston Evening Journal, of March 2d, 1859?

(Counsel for defendant objects to evidence of the contents unless
409 the book itself be put in as being proper evidence.)

In view of this fact, are you not of opinion that your pamphlet was printed after March 2d, 1859?

Ans. I give my opinion from the title-page here, which was August, 1858; the appendix might have been added since. I formed my opinion of the date of this from looking at the date here.

Cr.-int. 130. If the edition having the appendix was published prior to March 2d, 1859, can you account for its containing an extract from a newspaper of that date; and if so, how?

Ans. I can't account for it except that this was issued after the first pamphlets. It appears that that would explain it, unless I made a mistake on this title-page of a year.

Cr.-int. 131. In point of fact, did their appear in the Boston Journal of March 2d, 1859, an account of a presentation to you with a letter signed by some high-school teachers. and did you incorporate that paragraph in the appendix to your pamphlet?

Ans. I think I can account for that now. I'm of the opinion that I was some time getting up this pamphlet, and I added to it from time to time as I got matter, thinking it was incomplete, perhaps; added more to it from time to time.

Cr.-int. 132. Where and by whom was this pamphlet published?

Ans. In Boston; Mr. Whittemore attended to the publishing of it.

Cr.-int. 133. Did you receive a silver pitcher from the teachers of the high school at Boston about February 25th, 1859?

Ans. I received a silver pitcher, and make up my mind from the dates and recommendation in the Journal that I did.

Cr.-int 134. You have a slip cut from the Journal of that date containing an account of that presentation, have you not?

410 Ans. I have; I have the pitcher; it is very valuable.

Cr.-int 135. Can you state what was the period of time between the publication of your first circular and this pamphlet?

Ans. The first seems to have been published in New York, I think in 1857; I wouldn't say positively.

Cr.-int. 136. How long did you remain in Boston after arriving there in 1852?

Ans. Was employed by superintendent in the State of Maine to teach. I was teaching then in the English high and Latin schools, and other schools around here, in 1856. I can't say whether all my time between those dates was spent around here, or whether I was away some part of the time; I am not able to tell that now. I'm of the opinion that during that time I did go to introduce my books in Salem; taught in the public schools there; taught in public schools in Lynn, and in Newburyport, Charlestown high school and grammar school; high school in Cambridge and grammar schools; Roxbury high school and grammar schools, and many other cities and towns in the vicinity. Made a visit to Maine in the fall of 1855, with my wife.

Cr.-int. 137. When you went to Toledo, did you, while you were away or afterwards, go South? If yea, how far, and what places did you go to?

Ans. No, I did not.

(The cross-examination is here, 1.50 p. m., adjourned by agreement, and at 2.30 p. m. resumed, as follows:)

Cr.-int. 138. Have you ever been in Cincinnati? Have you ever been in Cleveland?

Ans. I never have.

Cr.-int. 139. Have you ever been in Nashville?

Ans. Not that I know of.

Cr.-int. 140. Have you ever been in Memphis?

Ans. Not to my recollection.

Cr.-int. 141. You have stated in your cross-examination that you had much trouble at Brockport. What was that trouble?

411 Ans. Well, I haven't much of any recollection of it.

Cr.-int. 142. Give your best recollection, sir.

Ans. Well, I couldn't say much about it. I was sick at the time and not in my right mind, and continued so for a long time; trouble mostly in my head. Everything that I saw for six months, about that, was double; my eyes were turned so that I was cross-eyed.

Cr.-int. 143. Is that what you mean by "trouble" when you say "you got into trouble?"

Ans. Well, I did get into trouble; some way was accused of petty larceny, not that I know anything about. But the man who accused me exonerated me, has written letters to the school committee and master of the Latin school and many others here. He, Mr. Gardner, master of the Latin school here, received a scandalous circular, with a request to distribute it among his friends, and sat down and wrote a letter to this man and received a reply completely exonerating me. Judge Husbands, of Rochester, and many others there, Dr. Sumner, and Mr. Pratt, and a good many others, exonerated me from blame in the transaction. I say now, under oath, that I've no recollection of the transaction, but I've been persecuted, even unto death, as it were, by my enemies.

(Counsel for the defendant objects to the preceding answer and line

of cross examination of counsel for complainant, and to any further examination with reference to this subject, on the ground of immateriality and irrelevancy, and that it is an attempt to prejudice and harrass the witness by the introduction of matters which, even if true and not the result of malice, cannot discredit him as a witness or his truth and veracity.)

Cr.-int. 144. Was not Judge Husbands your counsel in this trouble?

(Same objection.)

Ans. I employed no counsel; had none; had nothing to say about it any way, nor knew anything about it.

Cr.-int. 145. Was this the first trouble of the kind that you ever had?

(Same objection.)

412 Ans. It was; first and only.

Cr.-int. 146. Were you ever in the jewelry store of Crosby, Morse & Foss, on Washington street?

Ans. I might have been.

Cr.-int. 147. Were you not there on one occasion that you remember?

Ans. I might have been in there a number of times.

Cr.-int. 148. Don't you know that you were there at least once?

Ans. I think I was there.

Cr.-int. 149. Do you remember one occasion when you were there and some one came and took you back there?

(Same objection.)

Ans. I do not.

Cr.-int. 150. Did you never restore any lockets to Crosby, Morse & Foss?

(Same objection.)

Ans. Not to my recollection.

Cr.-int. 151. Do you not remember going to Crosby, Morse & Foss's, coming away, going back at the request of some one, and giving them back some lockets?

(Same objection.)

Ans. I do not.

Cr.-int. 152. Are you sure of that?

(Same objection.)

Ans. I am sure that I never went back there and gave them back any lockets. I am sure of it, perfectly sure.

Cr.-int. 153. Did you ever give them back any article or articles of jewelry?

(Same objection.)

Ans. I did not; never went back to give them back any articles.

413 Cr.-int. 154. Did you ever give them back any articles of jewelry without going back there, sir?

(Same objection.)

Ans. I don't know that I did.

Cr.-int. 155. What do you think?

(Same objection.)

Ans. I couldn't say.

Cr.-int. 156. Will you swear you didn't, sir?

(Same objection.)

Ans. I've no recollection of it.

Cr.-int. 157. On your oath, sir, do you mean to say that you have no recollection whatever of delivering any lockets or other articles of value or articles of jewelry to Crosby, Morse & Foss, or any one on their behalf?

(Same objection.)

Ans. I don't recollect it.

Cr.-int. 158. Will you swear that you never did?
(Same objection, and as already answered.)
Ans. I have already answered the question.
Cr.-int. 159. Answer it again, sir.
(Same objection.)
Ans. Not to the best of my recollection.
Cr.-int. 160. Did you ever restore lockets or other articles of value or jewelry to any one?
(Same objection.)
Ans. Not that I recollect of.
Cr.-int. 161. Do you know A. H. & C. Burley, of Chicago, or either of them?
Ans. I don't know, but I did know them once by that name; somebody there.
414 Cr.-int. 162. Do you recollect any trouble you had with them in regard to gold pencils, or pens, or anything of the kind?
(Same objection.)
Ans. I'm very sure that I never had any; this is the first time I ever heard anything of the kind.
Cr.-int. 163. To return to the Pendletons. Which Miss Pendleton was it you saw at Payson & Dunton's rooms, and who asked you to come and see them?
Ans. Miss Laura.
Cr.-int. 164. Afterwards Mrs. Dunton?
Ans. Afterwards Mrs. Dunton.
Cr.-int. 165. Is she still your wife?
Ans. She is not.
Cr.-int. 166. She obtained a divorce from you, didn't she?
(Objected to as immaterial and irrelevant.)
Ans. I understand so.
Cr.-int. 167. Don't you know so?
(Same objection.)
Ans. Yes.
Cr.-int. 168. When and where was it obtained?
(Same objection.)
Ans. Obtained in, I presume, in Rochester; I couldn't say at what time; it was a year and a half ago, and more.
Cr. int. 169. Was it not in 1868 or 1869, sir?
(Same objection.)
Ans. In 1871 or 1872, I believe; I couldn't tell now. It was 1871, I think.
Cr.-int. 170. On what ground was this divorce granted?
(Same objection.)
415 Ans. There had been an effort made for a long time to get the divorce. Another man seemed to think more of her than I did, and she more of him than she did of me; or, at least, she pretended to. I kept away, and allowed them to get a divorce, and helped them to it, in fact; I wanted to get out of it.
Cr.-int. 171. How did you help them to it?
(Same objection.)
Ans. By letting them get their testimony and keeping away; by letting them get what they wanted to make out their case; I know that they couldn't have got a divorce if I had opposed it.
Cr.-int. 172. Did you help them get their testimony; and, if so, how?
(Same objection, and as prying into the witness' private and family affairs in a manner as unbecoming as it is irrelevant and impertinent,

and as to which the witness cannot be properly required to answer, he chooses not to do so, under any of the issues in this case.)

Ans. I have answered as far on that as I care about.

Cr.-int. 173. Will you please look at this gentleman, and state if you ever remember seeing him?

(Same objection.)

Ans. I saw him yesterday in here; I've no recollection of ever seeing him before yesterday.

Cr.-int. 174. Did this gentleman ever show you a Lipman pencil in the year 1859?

(Objected to, that nothing is shown the witness as a foundation for this question, and that there is nothing in this case as a Lipman pencil. Question withdrawn.)

Cr.-int. 175. Do you know what a Lipman pencil is?

Ans. I do not.

Cr.-int. 176. Did this gentleman ever show you a pencil like that, and say anything to you in regard to it?

(Objected to as above.)

416 Ans. I don't think he did; I've no recollection of ever seeing him before, and I recollect circumstances; if I see a man once I generally know him again; a face like that.

(The pencil shown the witness and referred to in the last interrogatory and answer thereto is offered in evidence by counsel for complainant, and has been identified and marked, by the magistrate, "Complainant's Exhibit 11.")

Cr.-int. 177. Don't you remember that this gentleman met you at Memphis, at race-time, in the year 1859, and had some such conversation as this with you: you told him that your name was Dunton, and you were a writing-master; he told you that he was in the pencil business, and showed you a pencil like complainant's Exhibit 11; you said that you had never seen a pencil like it before, and that it was a good thing; don't you remember something like this?

Ans. Nothing of the kind; I never was in Memphis or any town, city, or village, between St. Louis and New Orleans; the first stopping-place on the way up in the steamer was at St. Louis, in the year 1844; I went from Boston to New Orleans in a sailing-vessel, and then up the river to St. Louis, the first place I stopped; that was in 1844, and I've never been down the Mississippi, or anywhere down that section, since.

Cr.-int. 178. We have spoken of a presentation of a pitcher to you; was this at the conclusion of a quarter's lessons or course of lessons?

Ans. I am not able to say.

Cr.-int. 179. Please look at the extract from the Journal, marked, now shown you, and state whether or not you do not think that this presentation was at the end of a quarter's lessons.

Ans. No, I don't think it was; the reason is that this pitcher was manufactured expressly for me, and it was not manufactured until some time after I had finished my course of lessons.

417 Cr.-int. 180. You have been present pretty constantly at the examinations taken here in this cause, have you not?

Ans. Yes; pretty generally; but not all the time.

Cr.-int. 181. And you have, to some extent, aided in procuring the testimony in this cause, have you not?

Ans. I've been requested by counsel to give them what information was within my reach to assist them in getting testimony.

Cr.-int. 182. In your direct examination you speak of having seen a

cedar pencil that had been stepped on, and the lead was bare in the groove, and that this suggested to put a bit of rubber in. Where did you see this pencil that had been stepped on?

Ans. In my testimony I said stepped on or something else, or from some other cause was split. It was either, I think. I boarded at that time at Mrs. Golden's, down at the foot of the Common here—Common street, corner of Boylston street. Whether it was there or at—I was thinking at the time I said that that it was at Mr. Chandler's, but I've been thinking since that it was at my boarding-place, at Mrs. Golden's. There was quite a number there.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 74. In your cross-examination you have referred to certain certificates you received from certain persons, exonerating you from blame with regard to the trouble at Brockport, in regard to which you were cross-examined. Please look at the papers now shown you, and state whether or not they are some of the original certificates you referred to.

Ans. They are.

Int. 75. Please append copies of these certificates now produced to be made by the magistrate from the originals.

418 (Copy.)

[Joseph D. Husbands' law-office, Nos. 49 and 50 Reynold's Arcade.]

OFFICE OF REGISTER IN BANKRUPTCY,
NO. 50 REYNOLD'S ARCADE,
Rochester, N. Y., April 20, 1870.

JOSEPH D. HUSBANDS,
U. S.
Seal.
Commissioner,
Rochester, N. Y.

To whom it may concern:

I have known A. R. Dunton, esquire, many years, and have personal knowledge of his "Brockport affair" since the fall of 1861.

I have never attributed any moral blame to him in that matter, for reasons quite satisfactory to myself on a close personal investigation. I think only envy, hatred, or malice could torture this into any reason now to lead his friends in any manner to distrust him, and I believe he can be fully relied on. He is too much of a man to let this depress his prospects. The world of letters needs his services. He is one of the most accomplished pen-artists I know, and his books are invaluable to chirographic science. His culture and attainments should induce the schools eagerly to seek his instruction and books. In my judgment it will be their loss if they neglect to do so. I cheerfully commend him as worthy of entire confidence for his skill, integrity, and ability, and usefulness in his profession.

JOS. D. HUSBANDS.

(Copy.)

ROCHESTER, N. Y., *July* 9, 1870.

I hereby certify that I am a practising physician of the city of Rochester; that on the 18th of September, 1861, I was called to see Mr. A. R. Dunton. I examined him, and pronounced his case insanity, brought on

by hard mental labor, and treated him some time for that disease. I consider him now a perfectly sane and well man. Mr. Dunton has always been highly esteemed in this community.

CHARLES SUMNER, M. D.

419 Acknowledged before me, this 9th day of July, 1870, *before me*, at Rochester, N. Y.

ERASTUS DARROW,
Commissioner of Deeds.

{ Erastus Darrow, commissioner of deeds, Rochester, Monroe Co., N. Y. }

The above are hereby certified by the magistrate to be correct copies of the original certificates referred to in int. 75, above.

F. DODGE,
Notary Public and Examiner.

APRIL 10TH, 1873.

Int. 76. In your direct examination you have stated that in September, 1858, you were employed by the superintendent of public schools at Toledo, Ohio, to teach in the schools. In your cross-examination you have stated that you were present at the time of the presentation of the silver pitcher to you in March, 1859, at Boston. Did you return from Toledo in the interim?

(Objected to as leading.)

Ans. I may have come back, but I have no recollection of it.

Int. 77. Are you or not certain that you went to Toledo in September, 1858?

(Objected to as leading.)

Ans. I am satisfied that I made a mistake in the time—that instead of 1858 it was 1859—by the letters from the superindendent to me to employ me, which I have examined since.

Int. 78. During the time you were sick, subsequent to your going to Toledo, and when, as you have testified, your writing-schools were being conducted by your wife and others, with such assistance as you yourself were able to render, at different places at the West and in Philadelphia, as you have stated, were your said pencil-erasers in use in said school?

420 (Objected to as new matter, and not in reply to anything in complainant's cross-examination.)

Ans. Well, I always had them with me; they were used more or less, as occasion required.

Additional cross-interrogatories by Mr. Blake, for complainant, and answers of the witness thereto:

Cr.-int. 185. Did you ever see them used or use them yourself in these schools during your illness?

Ans. I have seen Mrs. Dunton use them frequently; she could draw very beautifully, and I've seen others use them.

Cr.-int. 184. Do I understand you now to say that you left Boston in the autumn of 1859 for Toledo?

Ans. It must have been in the autumn of 1859, by the dates there.

Cr.-int. 185. On what day and year did you marry the second Mrs. Dunton?

Ans. I'm not able to say; I have the certificate; I saw it to-day noon.

Cr.-int. 186. Is not your brother, Seldom Dunton, lame?

Ans. He is; a permanent lameness; his hip out of joint, when he was nine years old.

A. R. DUNTON.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER.

421 The deposition of RACHEL B. THOMAS, taken on behalf of the defendant, before Frederic Dodge, notary public, and special examiner of said court, at Boston, in the District of Massachusetts, on Friday, March 7th, 1873, Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for the complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by Mr. Washburn for defendant, and answer of the witness thereto:

Int. 1. What is your name, residence, and business?

Ans. Rachel B. Thomas; Camden, Maine; taking care of my family.

Int. 2. Are you acquainted with either of the parties to this suit?

Ans. No, I am not.

Int. 5. Are you acquainted with Alvin R. Dunton, now present; and, if so, how long have you known him?

Ans. I am; from forty to forty-five years.

Int. 4. How old are you?

Ans. Seventy.

Int. 5. Did you see Mr. Dunton at any time in 1855; and, if so, where and under what circumstances?

Ans. I did, at our house in Camden, Maine; he was there with his wife on a visit.

Int. 6. State the time of the year, and how long he remained.

It was in November, thanksgiving-day; his wife had been there some little time and he came and stayed there. I don't recollect just now how long, but I should think from one to three weeks, as near as I can recollect.

Int. 7. How do you fix said time of his being there?

Ans. Well, he was married that year; he had been married two or three months. If you want anything more special, my daughter was married that same year, and they all met there thanksgiving-day; that is why I recollect it so plainly.

Ans. While Mr. Dunton was there, was he engaged in any work or occupation? If so, state what.

422 Ans. He was teaching in the institutes, I think, at the time; I think in 1855 or 1856; teaching penmanship.

Int. 9. Did you see him do any work at your house; and, if so, what was it?

Ans. Writing and drawing.

Int. 10. Drawing what?

Ans. Wreaths and flowers, and such as that, on Bristol board, I believe it was. I saw him at such work frequently.

Int. 11. What did he do it with?

Ans. With pencil; pencil with a lead at one end and rubber at the other.

Int. 12. Of what material was the pencil composed?

Answer. I should say the same material that our common pencils are; that is, I should say red-cedar wood.

Int. 13. Please look at the pencil-eraser now shown you, being defendant's exhibit E, and state how the pencil with lead at one end and rubber at the other, of red-cedar wood, which you state you saw him use then, compared with this exhibit?

Ans. I should say it was the same pencil, or one precisely like it; the marks, I believe, correspond.

Int. 14. Have you seen this pencil-eraser, defendant's exhibit E, before; and, if so, when did you last see it?

Ans. I could not say how long it has been; well, it has been, perhaps, three or four weeks since I have seen it.

Int. 15. Where did you then see it?

Ans. In a box in a drawer of my bureau, in Camden, Maine.

Int. 16. What was the occasion of your then seeing it?

Ans. I went to the box for some other things that was there in the box with it; pens, I think, it was. I went to the box because I wanted a pen to use. I was writing, and wanted a pen.

Int. 17. What did you then do with that pencil-eraser?

423 Ans. I didn't do anything with it; it remained there; it remained there until Mr. Dunton came to Camden, a week or two after, and asked me if I had any of the pencil-erasers which he had used there. I told him I would look, and I found one new one and this one, that had been used; the new one was of another kind; he said that was of no use, but he wanted this, and I told him to take it; he said it would save him going to Belfast and to Appleton; he took it, and carried it right away with him, and I haven't seen it till to-day; this is it, or one precisely like it.

Int. 18. How long had it been in your drawer?

Ans. Well, it has been there from the time he was there in 1855 or 1856.

Int. 19. How do you know?

Ans. I know, because no one had access to the drawer but myself.

Int. 20. Did you ever see any one have a similar pencil-eraser except Mr. Dunton?

Ans. I never did.

Int. 21. Did you ever see Mr. Dunton have such a pencil-eraser at any other time than 1855 and 1856, as you have stated?

Ans. I don't know that I have noticed in particular whether he has used them since that time or not.

Int. 22. After he came to your house in 1855 and in 1856, how often did you see him have and use pencil-erasers precisely like that Exhibit E?

(Objected to as leading.)

Ans. Sometimes for two or three days, in drawing, and sometimes it would be as long as that that he didn't use them. That was during the two or three weeks that he was there; sometimes every day; sometimes not as often; saw him use it in 1856, but not as often, as he was not there as long. I mean in the first part of 1856, in the winter.

Int. 23. Were any others present while he was using it, who saw or could have seen it, and his use of it, also?

424 Ans. Yes, my family. I can't say how many saw him or didn't see him. I had a large family, and it is quite impossible for me to say who saw and who di l not.

Int. 24. Was any other pencil-eraser of Mr. Dunton's in your house at any time except the one precisely like Exhibit E?

Ans. Yes, there was.

Int. 25. Describe it.

Ans. I think it was a white pencil, with rubber in one end and lead in the other; shorter than the cedar pencil.

Int. 26. Please look at defendant's Exhibit I, now shown you, and state how it compared with this pencil-exhibit.

Ans. It looks very much like the same one. I should suppose it was the same.

Int. 27. When did you see this last-described pencil-eraser? Where, and under what circumstances?

Ans. I don't know that I ever saw that one in particular until I looked in his trunk for it, and found it among his writing-materials, pencils, and other things, where he had left them. The trunk was in a small chamber in my house in Camden, where he had left it with other things. I should think it was near three weeks ago that I found it.

Int. 28. When did he leave it there?

Ans. In 1856.

Int. 29. Had said pencil-eraser been there from that time till you found it as above?

Ans. Yes, it had.

Int. 30. How do you know?

Ans. Well, no one had been near the trunk or meddled with it.

Int. 31. What was the occasion of your finding the last-named pencil-eraser, as you have testified?

Ans. Mr. Dunton wished me to look for it, and see if there was any there.

Int. 32. What did you do with it when you found it?

Ans. I enclosed it in a letter and sent it to him in Boston.

425 Int. 33. Had Mr. Dunton ever been to that trunk, or opened it, from the time he was in your house in 1855 and the first part of 1856?

Ans. Never to my knowledge.

Int. 34. Would you have known of it had he done so; and, if so, why? (Objected to for form.)

Ans. I should have known so had he done so, as he could not have gone to the trunk without asking where it was; he did not know where it was.

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 1. How did you come to know Mr. Dunton?

Ans. I knew him because I was acquainted with his father and mother years ago.

Cr.-int. 2. Is there any connection by marriage or otherwise between your or your husband's family and Mr. Dunton, or Mr. Dunton's wife?

Ans. Yes; Mr. Dunton's wife was my niece.

Cr.-int. 3. Was Mr. Dunton ever at your house prior to 1855?

Ans. I don't think that he was; I have no recollection of it.

Cr.-int. 4. May he have been there prior to that time and you not remember it?

Ans. It might be so.

Cr.-int. 5. Was Mr. Dunton at your house subsequent to the winter of 1865 and 1866, until he was there some three or four weeks since?

Ans. Yes; three years ago last summer, two years last summer, and one year ago last summer; every year for three years he's been there more or less.

Cr.-int. 6. At any other times during the interval?

Ans. I don't recollect that he has; he was not there at all from 1856 until three years ago.

Cr.-int. 7. Did he, so far as you know, always call at your house when he happened to be in the town of Camden?

426 Ans. I know that he did always when he was in Camden.

Cr.-int. 8. Where did he go at the conclusion of his visit to you in November, 1855?

Ans. I could not say certain whether he went to Hope or Rockland.

Cr.-int. 9. What else was in the box in your bureau drawer from which you took the pencil-exhibit E?

Ans. There were pens, pen-holders, one or two black pencils, buttons, and lots of such other little things as ladies generally keep and use.

Cr.-int. 10. Then you had constant occasion to go to the box to take out those articles of common use which you now mention as you required them?

Ans. Well, not very often; I didn't have occasion to go to that box; sometimes I didn't see the inside of it for a month at a time; there were other boxes that contained the articles I wanted.

Cr.-int. 11. You think you went to it as often as once a month on an average?

Ans. No, I do not.

Cr.-int. 12. Six times a year?

Ans. Perhaps I did, if there was anything there that I needed.

Cr.-int. 13. Were any articles placed in the box from time to time? Were any articles taken from the box from time to time and not returned to it?

Ans. There was.

Cr.-int. 14. Was the box locked?

Ans. No, it was not.

Cr.-int. 15. Was the drawer locked?

Ans. The drawer was locked.

Cr.-int 16. Can you specify any occasion when you remember to have seen a pencil like Exhibit E since the winter of 1855 and 1856, up to three or four weeks ago?

Ans. I don't exactly state whether I did or did not; I had no occasion to use it, and I know that I never had taken it out of the box.

Cr.-int. 17. Do you remember putting it in the box?

Ans. Yes, I do.

427 Cr.-int. 18. Did you look at any other place besides the box for any pencil or eraser, or the two combined, when Mr. Dunton asked you to look?

Ans. No, I did not.

Cr.-int. 19. Did you first examine the trunk, or did he?

Ans. I did.

Cr.-int. 20. Was that before or after you found the pencil in the box?

Ans. It was before.

Cr.-int. 21. How long before?

Ans. It might have been three weeks, as near as I can recollect.

Cr.-int. 22. What was the occasion of your looking in the trunk?

Ans. Mr. Dunton wished me to, to see if there was any pencils he left there. He wrote me to that effect.

Cr.-int. 23. Was the trunk locked?

Ans. It was not.

Cr.-int. 24. Had it been locked since 1856, to your knowledge?

Ans. It had not.

Cr.-int. 25. Was the room in which it was kept locked?

Ans. No.

Cr-int. 26. What was the room in which it was kept used for?

Ans. To stow away trunks, boxes, baskets, anything of that kind we'd no immediate use for; a store-room.

Cr.-int. 27. Chambers on the same floor?

Ans. Yes; it opened into the same entry with the chambers.

Cr.-int. 28. What else was in the trunk besides this pencil?

Ans. Writing-books, papers of almost every description, writing-books, pamphlets, and other books. I couldn't enumerate them nor tell what they were.

Cr.-int. 29. Did the trunk itself belong to Mr. Dunton?

Ans. It did.

428 Cr.-int. 30. When did he first bring it there?

Ans. I think it was at the same time, either 1855 or 1856, when he first came there.

Cr.-int. 31. Did he have any other trunks at that time?

Ans. He had.

Cr.-int. 32. Where did he keep his trunk while at your house—I mean that particular one?

Ans. He kept it up in the porch-chamber, where it remained; it has been there ever since.

Cr.-int. 33. What did Mr. Dunton say in the letter, so far as you know—the first letter you received from him—about this?

Ans. He asked me if I wouldn't look in that trunk that he left and see what pencils he had left there; that is about as near as I can recollect.

Cr.-int. 34. You never had had occasion to go to the trunk before that?

Ans. No, I had none.

Cr.-int. 35. Did you put the pencil like Exhibit E in the box in the fall of 1855, or in the early winter of 1856?

Ans. As near as I can recollect it was in 1855.

Cr.-int. 36. Who was present when you put it in the box, if any one?

Ans. No one.

Cr.-int. 37. Do you remember what time in the day it was?

Ans. I don't know whether it was morning, noon, or night.

Cr.-int. 38. In what room were you when you put it in the box?

Ans. In my sleeping-room.

Cr.-int. 39. Did Mr. Dunton, in 1855 or 1856, use in your presence more than one pencil with lead in one end and rubber in the other?

Ans. I could not say whether he used one or a dozen.

Cr.-int. 40. Did he use an implement like Exhibit D, now show you?

429 Ans. I don't know that I ever saw one in our house before.

Cr-int. 41. Did he use one like Exhibit P, shown you?

Ans. I never saw one like it to my knowledge.

Cr.-int. 42. Did he use one like Exhibit K, shown you?

Ans. I never saw him use any like it.

Cr.-int. 43. Or like Exhibit H, now shown you?

Ans. No; I never saw any to my knowledge like any of them.

Cr.-int. 44. How about complainant's Exhibit 9, now shown you?

Ans. I don't know that I ever saw Mr. Dunton have one in his possession.

Cr.-int. 45. How as to Exhibit G, now shown you?

Ans. I never noticed any in his possession like it.

Cr.-int. 46. How as to the pencil now shown you?

Ans. I think I have seen some as large as that in his possession, but whether they were the same thing or not I couldn't say.

(A pencil shown the witness at this interrogatory by the plaintiff's counsel is the pencil referred to, and has been marked for identification, by the magistrate, "Compl. Ex. 10, F. D. N. P., March 7, 1873."

The defendant's counsel requires that said pencil, as marked for identification, be put in evidence by complainant and made part of this record, for the reason that the witness has been examined and testified in regard to it when it was not already an exhibit in the case, nor had it in any way been referred to upon the examination-in-chief, and requests the magistrate to certify to the above facts.

The complainant's counsel having produced the pencil referred to and had it marked for identification, consents that it be attached to the record and exhibited to the court, but does not offer it in evidence.

430 It is admitted by the complainant's counsel that prior to the time said pencil was shown the witness it had not been made an exhibit in this case.

The defendant's counsel thereupon object to any limitation of the legal effect of the introduction of said Exhibit 10.)

Cr.-int. 47. Did you see Mr. Dunton use any pencil like that?

Ans. This is nothing but a common cedar pencil, is it?

Cr.-int. 48. That is for you to say.

Ans. I don't know but what I have seen them on the table where he has been at work, but I cannot say I ever saw him use that one in particular, he had so many different ones.

(The pencil shown the witness and referred to by her in the last two interrogatories and answers thereto, has been marked for identification, by the magistrate, "Compl. Ex. 11, F. D. N. P., March 7, 1873.")

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 35. You have stated that when Mr. Dunton visited you in 1855 you saw him have and use a pencil-eraser having lead in one end and rubber in the other end. Please state how the arrangement in defendant's Exhibit G, now shown you, of lead in one end and rubber in the other end, compared with the arrangement of the lead and rubber in the pencil-eraser you then saw him have and use, which you say was precisely like Exhibit E now shown you.

Ans. I can't say. I don't know as I exactly understand it.

Int. 36. I mean was the arrangement of the lead and rubber the same, or different?

Ans. To appearance, it looks like it; certainly it does. It was a pencil of about the same size.

431 Int. 39. Mr. Wetmore showed you that pencil, Exhibit G, and asked you whether Mr. Dunton ever used an implement like that, Exhibit G, and you answered, "I never noticed any in his possession like it." Is that answer correct?

Ans. Well, I was deceived in the looks of the pencil; I thought it was a black one; I couldn't say that I ever saw Mr. Dunton use one precisely like it, although it is very similar to the other.

Int. 38. Describe the chamber in which Mr. Dunton's trunk was kept.

Ans. It's in a porch chamber; the porch is not as high as the house, and the chamber, of course, is very low; the door is about as high as this table, about three feet high and two and a half wide; there is not

a window in it; there is no light except what is admitted from the window in the next chamber, when the door is open; it is a sharp roof, and that part is only one story, so that this chamber is in the roof.

Int. 39. Have you ever before been a witness in any case?

Ans. Never.

Additional cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 49. You have stated that you do not remember having seen Mr. Dunton use any pencils or implements like Exhibits K, P, D, H, and complainant's Exhibit 9, now shown you. Are you positive you may not have seen him use some one of those identical instruments, or others precisely similar to them?

Ans. I am not positive; I wouldn't say that I had or had not.

RACHEL B. THOMAS.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of BENJAMIN F. LORD, taken on behalf of the defendant, before Frederic Dodge, a notary public, and special examiner of said court, at Boston, in the district of Massachusetts, on Saturday, March 8th, A. D. 1873, Chas. F. Blake, esq., and Edmund Wetmore, esq., appearing for complainant; John S. Washburn, esq., and P. Thacher, esq., for defendant.

Direct interrogatories by Mr. Washburn for defendant, and answers of the witness thereto:

Int. 1. State your name, residence, and occupation.

Ans. Benjamin F. Lord; painter—sign and fancy painter; Boston; place of business 65 Cornhill; residence, 275 Dorchester street, South Boston.

Int. 2. Do you know either of the parties to this case?

Ans. No; I take no interest in it whatever.

Int. 3. Do you know Alvin R. Dunton; and, if so, how long have you known him, and what acquaintance have you had with him?

Ans. I've known him since 1835; been in company with him as a writing teacher; I think it was in 1839, in Lowell, as near as I can recollect; continued with him till he came here, in 1841 or 1842; I was first employed by him by the week for a season, and afterwards we formed a partnership; and when he came here to Boston, in the spring of 1841, we were partners, and after that I left him and went into business on my own hook round the country, teaching penmanship; I think I left him in the summer or first of the fall of 1842.

433 Int. 4. Were you after that accustomed to see him; and, if so, when and how often?

Ans. I occasionally saw him in the street and in his office; he had offices here in Boston, and I used to run in occasionally; he afterwards left for Philadelphia, as I understood it, and for years I didn't see him at all; quite a number of years; before he went to Philadelphia he was in that office where I went up to see the tools that he had.

Int. 5. When was it that you went to his office to see the tools that he had, as you have stated, and state what occurred?

Ans. We used to make our own tools, when I was with him, and we got up a style, (it wasn't nothing to do with this thing,) and used to sell them; it was like that one, (defendant's Exhibit P, shown the witness, is the style referred to by him,) and we used to sell them; we were watching each other to make any improvement, if we could, over each other; were rather interested in the style in the pencil; it was in the last of 1852 or first of 1853; I think it was in 1852; some time in December, 1852; I couldn't tell you what day; I think it was that month, in fact I know it was; I was going down to Salem street, to see a doctor of mine, and get some medicine, and as I was coming back another way I thought of Dunton, and ran right up to his room, (it was near 228 Washington street,) to see him first; I met him on the floor coming towards me as I went in; he was at work on some large text he had been getting up, with his hands full of tools; he says, "Come, I want to show you what I've got here," and went right back to the table, and sat down and went to work on the script there to show me; he was getting out some charts to be published; he said, "I want to show you this; I've got a new rubber here and pencil," and immediately went to work to show me how he worked, and how he wanted to use it in some of the work where the spaces were very near, and he wanted it fine, to rub off and turn up the edges where he couldn't get a bigger piece of rubber; that's all there is about that.

434 Int. 6. Describe that implement.

Ans. Oh, it looked like any pencil, with a rubber in one end and black pencil in the other—black lead. I remember one thing, I thought I could make a little better one than he had there, and he asked me, I think, if I'd ever made anything of the kind, because I was always at work; I used to use cork and other things on my work; rubber wasn't of much account with me; this was the first one of the kind I'd seen.

Int. 7. Of what material was that pencil-eraser composed?

Ans. I took it to be cedar; in fact I'm satisfied it was cedar; I used to use them myself, these cheap cedar-pencils; they'd split very easily, and you could take the lead out, and put anything in, and put them together again.

Int. 8. Please look at the pencil-erasers now shown you, defendant's Exhibits E and G, and state how the pencils you then saw him have and use, and the arrangement of lead in one end and rubber in the other of that compared with these and with the arrangement of lead and rubber in these.

Ans. Those that he had were intended to be as good as these, and made like these; perhaps these are a little better finished as to the wood in that way; the points were no better as a general thing than in these; he didn't have so good a piece of rubber as this.

(The rubber in Exhibit E is here referred to.)

Int. 9. Was the wood at the ends of these pencils cut away as in these exhibits?

Ans. Yes, sir.

Int. 10. How many of these pencil-erasers which you have described, like Exhibits E and G, did you then see him have?

Ans. I didn't see but one finished one at that time.

Int. 11. Did you subsequently, and if so, when and where, see him have and use such pencil-erasers, and how many?

435 Ans. I couldn't tell how many, but he had some half a dozen in his pockets, and stopped on the street and spoke to me about half a minute; he took them out of his pocket and showed them to me, and hurried along; this was in Boston; I think on School street; it might

be two months after the first time I saw them; Dunton was going up, I was coming down.

Int. 12. Did he ever draw any cards with these pencil-erasers at your house or elsewhere?

Ans. First place, you can't draw cards with the eraser, but I've seen him take the other end and draw cards repeatedly, take pencils; a hard pencil is as good as a style on some cards; he drew some at my house. I can't tell you where else he used to draw—in other places, and folks would congregate round; just as likely to see him on one street as another; my idea is I might meet him in some place any time, you know, restaurant or anywhere; what I mean to say was might have met him in some place, in a store, where he was showing off his writing.

Int. 13. Did you see him, on the occasions you have mentioned, have and use pencil-erasers like Exhibits E and G in the presence of other persons, and, if so, how many persons and how often?

Ans. I don't know that I ever saw him use the eraser part on these occasions; can't say that I have, but I've seen him use them before other persons; there'd be two or three round, and they'd want a card drawn, and he'd do it on the spot; he'd use the lead part of these erasers; he generally used the style; you can write much better with the style.

Int. 14. Did you know Rufus Cummings? Have you any knowledge, and if so what, of his making any of said pencil-erasers for Mr. Dunton? State if you know whether he is or not now living.

Ans. Yes; he is now dead; he, being a very dexterous man, used to make such things, and did make some styles for Mr. Dunton; whether he made any of the erasers or not I don't know, but they talked of it, he and Dunton, so Cummings told me. He was a piano-forte maker
436 and varnisher; we'd had a number of talks about it, about making these things, prior to the time of my seeing them.

Int. 15. Please state the year when you saw Mr. Dunton use these pencil-erasers in the presence of other people, as you have testified.

Ans. As I've said before, I don't know that I ever saw him use the eraser; it must have been later than the time I first saw the eraser; some time in 1853 that I saw him use the pencil-point of said pencil-erasers, as I have testified.

Cross-interrogatories by Mr. Wetmore for complainant, and answers of the witness thereto:

Cr.-int. 1. Is there any particular circumstance, besides those already mentioned by you, to fix on your mind the two occasions testified to by you, one at 228 Washington street and one in School street, in the street, when you saw Mr. Dunton have the pencils with lead in one end and rubber in the other?

Ans. I don't know of anything; I was in a hurry when I came down School street; wanted to get to Washington street as quick as I could, and he was in a hurry; nothing else.

Cr.-int. 2. Was the chart he was working on at Washington street a map-chart to hang up in a room?

Ans. No, sir; it was a writing-chart; he had been striking off letters with red chalk, about four to six inches long, and he showed me how he could strike out the edges with the rubber in these pencil-erasers, where they lapped over.

Cr.-int. 3. You have never seen Mr. Dunton or anybody else use these pencils with rubber in the end or have them prior to the first of January, 1858, except as already testified to by you?

Ans. No; I've never seen any one have them.

Cr.-int. 4. Is this examination carried on at your house and in your room, where you are confined by a severe attack of illness, and has your examination now continued for over an hour, and do you feel exhausted?

437 Ans. Yes, sir; it is; it has continued for over an hour; not much exhausted.

BENJAMIN F. LORD.

Plaintiff's counsel waives further cross-examination, in view of the present condition of the witness as to health and strength.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER. }

The deposition of JOHN M. WHITTEMORE, taken on behalf of the defendant, at Boston, Massachusetts, before Frederic Dodge, notary public, and special examiner of said court, on Tuesday, April 8th, A. D. 1873, Chas. F. Blake and Edmund Wetmore, esqs., appearing for complainant; John S. Washburn and P. Thacher, esqs., for defendant.

Direct interrogatories by John S. Washburn, and answers of the witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. John M. Whittemore; Wallaston, Mass.; stationer.

Int. 2. From 1851 till 1856 what was your business and firm, if any?

Ans. Stationers, publishers, and bookseller; Tappan & Whittemore.

Int. 3. When did that firm and business commence, and how long did it continue?

438 Ans. I think about 1845, and for about twelve years it continued.

Int. 4. Do you know either of the parties to this suit?

Ans. I know Mr. Faber.

Int. 5. Are you acquainted with Alvin R. Dunton, now present, and, if so, how long have you known him?

Ans. I am acquainted with him; I have known him, I should think, at least since 1835.

Int. 6. Did you ever have any business relations with him, or with reference to his copy-books and charts; if so, what and when?

Ans. I was a member of the firm of Tappan & Whittemore, that published his writing-books and charts; I think about 1850 or 1851 was the first when we had anything to do with Mr. Dunton in a business way; that was with reference to the writing-books; the first we published were in this form, (the witness here refers to defendant's Exhibit L, now shown him;) this (said Exhibit L) is one of the books we then published; it is difficult for me to state whether this chart (defendant's Exhibit O) was published before or after this book, defendant's Exhibit M; both were published by us; I think the chart was published first; the chart was published in 1852; I now find, on examination, that the book (Exhibit M) was published in 1855; this book (defendant's Exhibit N) is one that we published in the same year, 1855.

Cross-interrogatories by Mr. Wetmore for complainant, and answers of the witness thereto:

Cr.-int. 1. What is your age?

Ans. Fifty-three.

Cr.-int. 2. You are not positive as to the date when the firm of Tappan & Whittemore was formed, or how long it continued?

Ans. No, sir; not positive at this moment.

Cr.-int. 3. Did you, or any member of your firm, procure the copyrights of any of the exhibits produced by you on your direct examination?

439 Ans. Mr. Tappan, who attended to that part of the business, I have no doubt did; I did not do it myself.

Cr.-int. 4. Then you have no personal knowledge of the procuring of those copyrights?

Ans. Not to my recollection.

Cr.-int. 5. And you have no remembrance of the date when those copyrights were taken out, except from the title-page of the books themselves?

Ans. No.

Cr.-int. 6. Do you fix the date of the publication of the chart and books in any other way than by the imprint of the copyright upon them?

Ans. I do not at this time, as my attention has not been called to it before.

Cr.-int. 7. Please state what Mr. Dunton has just now said to you.

Ans. "I think this plate (showing Exhibit M or N, I can't say now which he meant) was cut in 1853;" that was what he said.

Cr.-int. 8. Was that spoken in a whisper?

Ans. No.

Cr.-int. 9. Please state what is the meaning of the appearance upon the covers of the Exhibits L, M, N, and O, of the names of the other firms besides those in which your own name appears.

Ans. They were simply correspondents, parties with whom we did business; they had nothing to do with the publication.

Cr.-int. 10. Did your firm have the engraving or lithographing of the books and charts, or did you procure it to be done by others?

Ans. We procured it done by others.

Cr.-int. 11. Were they all done by the same parties, as far as you remember?

Ans. I think not.

Additional direct interrogatories by Mr. Washburn for defendant, and answers of the witness thereto:

Int. 7. In relation to the date of the publication of the chart,
440 state whether or not you have any means of refreshing your recollection of the time when it was published, and, if so, what?

Ans. I find, by reference to an old ledger, that in April, 1853, we paid Tappan & Bradford a bill of something like ninety-nine dollars, which I think was for the engraving and printing of the chart, in part; I am not certain whether it was for the whole or a portion.

Int. 8. Please state from your recollection, and aside from the imprint upon Exhibits L, M, N, and O, how long ago they were published by your said firm.

(Objected to as a repetition of the evidence of the witness upon his direct examination, and not in reply to any new matter elicited upon the cross.)

Ans. Twenty years.

Int. 9. When did your firm cease to do any publishing business—I mean the firm of Tappan & Whittemore?

(Objected to, for the same reasons as the last interrogatory.)

Ans. I can't give the precise date; perhaps 1853 or 1854.

Int. 10. Did your firm or you ever publish any of Mr. Dunton's copy-writing books or charts after 1855?

(Objected to as above.)

Ans. Yes.

Int. 11. What and when?

Ans. A revised series; the date of the revision I can't give; well, it would be guesswork entirely; I think 1855 or '6—1856 or 1857; we published no revision after that, but we continued to publish his books.

Additional cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

441 Cr.-int. 12. Has Mr. Dunton talked with you in reference to your evidence to be given in this case before you testified?

Ans. No.

JOHN M. WHITTEMORE.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of CHARLES FRENCH, taken on behalf of the defendant, at Boston, Massachusetts, before Frederick Dodge, notary public and special examiner of said court, on Tuesday, April 8th, A. D. 1873; Chas. F. Blake and Edmund Wetmore, esqs., appearing for complainant, John S. Washburn and P. Thacher, esqs., for defendant.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Charles French; residing in South Boston; teacher Union Business College, 460 Washington street; firm of French & Chamberlin; Charles E. Chamberlin.

Int. 2. How long and where have you carried on that business?

Ans. I have carried on the business since the latter part of 1849; first at 111 Washington street, in connection with Payson & Dunton. In 1850, I think it was, I dissolved my connection with them, and opened
442 a school at 94 Tremont street; there I continued for seven years; about seven years. After that I discontinued teaching for a year or two, and then I resumed it; have since taught at 136 Washington street, and 460 Washington street, my present location, where I have been for the past seven years. Chamberlin came in three years ago.

Int. 3. Prior to 1849 how were you engaged?

Ans. In the latter part of 1848 I was in Baltimore. In the early part of 1849 I was in Salem, in the registry of deeds office. Previous to 1848 I was in Cambridge, at college four years, Harvard University. In 1848 I was graduated at Harvard.

Int. 4. Do you know either of the parties to this suit?

Ans. I do not.

Int. 5. Are you acquainted with Alvin R. Dunton, now present; and, if so, how long have you known him?

Ans. I am. I have known him for upwards of twenty years.

Int. 6. In what capacity or connection?

Ans. I have known him as a teacher of penmanship, and as the author of the Duntonian system of penmanship. He was in the habit of visiting my rooms almost daily while I was at 111 Washington street and at 94 Tremont street. I was never connected with him in business particularly; but he would come either to execute some piece of work in the room or to talk about penmanship in its various branches, about his books, and his troubles with Payson & Dunton, and on friendly calls.

Int. 7. Please look at defendant's Exhibit E, now shown you, and state if you have ever before seen a pencil-eraser similar to that, having lead in one end and a pencil-eraser of India rubber in the other end; and, if so, when first, and where?

Ans. I have seen similar pencils to this quite frequently; I can't remember the first time that I ever saw one; but I have seen them in Mr. Dunton's possession, and used by him. Whenever he came into my rooms he was in the habit of sitting down and doing some work, and always carried his tools with him, and among those tools I
443 have frequently seen him use a similar pencil to this. I remember very particularly the wood in the end where the rubber was inserted had split open or cracked, and for the purpose of retaining the rubber in its proper position he had wound a string around the end of it.

Int. 8. During what period was it that you saw Mr. Dunton have and use said pencil-erasers similar to Exhibit E?

Ans. I can't remember the date of first seeing them used, but it was between the years of 1850 and 1858, during my occupancy of rooms No. 94 Tremont street.

Int. 9. At what time during that period and at said place?

Ans. I can't state any definite time, but simply remember it as a custom during his visits to my room, and those visits were so frequent that it would be impossible for me to pick out any particular date.

Int. 10. When did those visits commence?

Ans. The visits at 94 Tremont street commenced on my first occupancy of the rooms, which I think was in 1850. He was in the habit of visiting the rooms at 111 Washington street, and has continued his acquaintance and been in the habit of visiting my rooms to the present time.

Int. 11. Did you see him have and use said pencil-erasers like Exhibit E during his said visits to 111 Washington streets?

Ans. I should say not, from the fact that he was not in the habit of doing work there, at that room, and his visits there were much less frequent than after I went by myself at No. 94 Tremont street.

Int. 12. How long was it after you went to 94 Tremont street, as you have stated, that Mr. Dunton commenced using said pencil-erasers at your rooms there?

(Objected to on the ground that the witness has already stated frequently that he cannot state the first time, and that this question is, therefore, leading.)

Ans. I can't state the first time I ever saw him use them. I simply remember the fact of seeing him use them during the occupancy of those rooms.

444 Int. 13. For how long a period of time was he accustomed to have and use the said pencil-erasers at your rooms No. 94 Tremont street, as you have testified?

(Same objection repeated, reinforced by the last answer of the witness.)

Ans. The period was as long as from between 1851 and 1856 or '7. I sold out my school at No. 94 Tremont street, I think, in 1856; I am not quite sure; I can ascertain definitely by reference to my records. It's

during the period of my being in those rooms that I saw those pencils used. For a year or two after leaving No. 94 Tremont street I had no opportunity of seeing them used, as I was out of the business.

Int. 14. Explain your last answer. Do you mean that you saw him using said pencil-erasers during all the period between 1851 and 1856 or 1857, or during only a part; and, if so, what part of that period?

(Same objection repeated, reinforced by the last answer of the witness.)

Ans. As I said before, I can't state when I first saw him use them, but that I had se n them used frequently during that period. I should say, for instance, that there was no doubt of his having used them in my rooms in 1853, 1854, and 1855.

Int. 15. Is that so, to the best of your recollection?

(Same objection.)

Ans. It is.

Int. 16. How often during that period of 1853, 1854, and 1855, did you see him using the said pencil-erasers in your rooms?

Ans. It would be impossible to state any definite number of times, but a great many times; he was so frequently in the rooms, and almost invariably would do some fancy-work, card-making, or something of the kind, and it was on those occasions that I would see him use them.

445 Int. 17. What kind of work did he do with these pencil-erasers when he so used them as you have testified?

Ans. I remember the particular occasions of his using them when writing copies in lead-pencil in illustrating his system; when, if a letter was not just rightly proportioned, shaded, or sloped, he would erase it in part or in whole with this rubber attached to the pencil. There was during that period quite a controversy between himself and Payson & Dunton regarding their copy-books, and both parties frequently came to me, told me of their differences and troubles with each other, and discussed various points of similarity in their styles of writing, frequently illustrating their points by writing words or letters with pencil. It was on such occasions that I would see this rubber used.

Int. 18. What do you mean by "this rubber" in the last clause of your last answer?

Ans. The rubber inserted in the end of the pencil.

Int. 19. You have spoken of Mr. Dunton writing cards with said pencil-erasers; what kind of cards?

Ans. What we call plain and ornamental cards; visiting-cards and ornamental cards; drawing flowers and scrolls on cards; he was in the habit of doing some kinds of ornamental work, first sketching it out in pencil with pencil, and afterward inking it in.

Int. 20. With what "pencil" did he sketch it out?

Ans. Lead-pencil.

Int. 21. How did he use these pencil-erasers in drawing and finishing those cards?

Ans. Sometimes to erase his work, sometimes to make a heavy stroke a little lighter, or a variation in the shading.

Int. 22. How did he use the other end, the lead end?

Ans. For his work, executing cards and ornamental work.

Int. 23. Of what material were these cards?

Ans. The cards were what we call card-board or Bristol board; he also used drawing-paper in getting up specimens of ornamental work.

446 Int. 24. What did he do with these cards and specimens after he had so drawn and finished them with these pencil-erasers?

Ans. He gave them to some one standing by, or left them in the office; a great deal of the work was for no special object, he always being in the habit of sitting down and doing work of this kind when he went in anywhere; frequently he would sit down at a desk, catch up a piece of paper or card, and execute some little fancy-work without any special object in view.

Int. 25. When engaged in so using the said pencil-erasers during the period you have mentioned, were any others than yourself and himself present; and, if so, how often and how many?

Ans. There were frequently quite a number present; he having great reputation as a penman, all in the room would be anxious to see his work; there would frequently be half a dozen standing round overlooking him.

Int. 26. Did he always, when he came in for the purpose of drawing these cards with said pencil-erasers, and when he in fact did said work with them, come alone or in company with others?

(Objected to as leading.)

Ans. Sometimes alone, sometimes with others; most frequently, I should say, alone. I don't intend to state that he always came to my office for the express purpose of doing work of any kind, but that when he did come in I think there was never a time when he didn't sit down and do some little fancy-work of one kind or another; it seemed to be a habit of his.

Int. 27. Were your said rooms open to the public or otherwise?

Ans. Always public.

Int. 28. To what extent, if any, during the period when Mr. Dunton was accustomed, as you have testified, to come there and use said pencil-erasers, were your rooms frequented by the public, if any?

(Objected to as leading.)

447 Ans. Both day and evening.

Int. 29. Do you know, and if so, what is the reputation of Mr. Dunton as a penman and a teacher of penmanship, and how long 'as he had it?

Ans. He has always, to my knowledge, been classed as a first-class teacher of penmanship and penman. I should say that he has always been classed as the best penman and best teacher in the United States.

Int. 30. Are you now able to state accurately when you left No. 99 Tremont street?

(The further examination of this witness is at this point, 2.10 p. m., postponed until to-morrow morning, Wednesday, April 9th, at 9½ a. m., by agreement of counsel; and at this point an adjournment until 3.15 p. m. to-day is agreed upon.)

In pursuance of the above agreement the examination of said witness is, on Wednesday, April 9th, continued as follows:

Int. 31. Are you now able to fix accurately the date at which you left your rooms at No. 94 Tremont street? And, if so, state it.

Ans. I am; I gave them up to Spear and Sawyer on the 18th of April, 1857.

Int. 22. To the best of your recollection, for how long a period prior to that had Mr. Dunton been accustomed, from time to time, to come to your said rooms and have and use there the said pencil-erasers, as you have testified?

(Objected to as before.)

Ans. Three or four years. For eight months previous to April, 1857, I was very little in the rooms, being engaged in other business, and gave up the charge of my school in a great degree to Capt. Spear, who

was then my first assistant; so that these visits of Mr. Dunton were previous to that time.

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

448 Cr.-int. 1. What was this other business?

Ans. On the 16th of August, 1856, I leased what was then called the Montgomery House, and was engaged there a principal part of my time up to April 18th, 1857, and after that my entire time for a year or two.

Cr.-int. 2. When did you resume teaching?

Ans. I can't state definitely without reference to my records, but, to the best of my recollection, in 1861 or 1862; it may have been a little earlier than that.

Cr.-int. 3. Where did you resume teaching?

Ans. On Washington street, between Winter street and Temple place. I don't remember the number of the building.

Cr.-int. 4. Was it 136 Washington street or 460 Washington street?

Ans. Neither.

Cr.-int. 5. Have you taught at either of those places?

Ans. I am now teaching at 460 Washington street; previous to that, I think, as I stated yesterday, at 136. It's the corner of Franklin street—136 or 186—I don't remember the number exactly; previous to that, at 94 Tremont street.

Cr.-int. 6. What were you doing in the year 1858?

Ans. I was then carrying on what was known as the Montgomery House.

Cr.-int. 7. In the month of June, 1858, were you not the principal of French's Commercial College?

Ans. I don't remember that I was teaching at all at that time.

Cr.-int. 8. Was French's Commercial College ever established at 289 Washington street?

Ans. It was; that's the number, I believe, between Winter and Temple place that I referred to in a previous answer, where I first commenced teaching again after disposing of my school to Spear and Sawyer. The exact date at which I commenced at 289 Washington street I can ascertain by reference to my books.

Cr.-int. 9. How long did you remain there?

Ans. I can't tell certainly without reference to my books. I removed from there back to 94 Tremont street.

449 Cr.-int. 10. And how long did you remain at 94 Tremont street after moving back?

Ans. That I can't state certainly without reference to my books.

Cr.-int. 11. During this second sojourn at 94 Tremont street, were you on friendly terms with Mr. Dunton?

Ans. I don't remember anything to the contrary.

Cr.-int. 12. Where was his place of business during this period?

Ans. I couldn't tell you, sir.

Cr.-int. 13. Was he in the habit of visiting you from time to time during this second period?

Ans. I don't remember particularly about that special period, but he has always been in the habit of visiting my rooms when he was in the city, during my acquaintance with him.

Cr.-int. 14. During his visits to you in this period, if he made them, did he sketch, draw, and use pencil-erasers?

Ans. I couldn't say whether he did or not. I couldn't say whether he ever made any visits to the room during that period.

Cr.-int. 15. Did he make any visits to your rooms when you were at 289 Washington street?

Ans. I couldn't say whether he did or not, nor could I say whether he did or not when I was at 136 or 186 Washington street—when I was at the corner of Washington and Franklin streets; he was absent from the city several years, and I don't know the exact date.

Cr.-int. 16. When did this absence begin, as nearly as you can fix it?

Ans. I have no way of fixing it any nearer than that it was after I disposed of my school to Spear & Sawyer. I never knew particularly of Mr. Dunton's whereabouts, excepting as he made his visits to my rooms when in the city.

Cr.-int. 17. Can you tell us when he returned from this absence, and resumed his visits to you?

Ans. To the best of my recollection, I should say within
450 a couple of years; within the past two years, according to the best of my recollection, although I believe he has visited me once or twice before he returned here permanently, and on one of those visits, I think he told me he was located on Chestnut street, Philadelphia,

Cr.-int. 18. Do you remember giving a certificate to Mr. Dunton in regard to his skill and his system, &c.?

Ans. I have given him, I think, two or three certificates.

Cr.-int. 19. Did you give him a certificate while you were president of French's Commercial College, No. 289 Washington street?

Ans. I don't remember about the time of giving but one of the certificates that I have given him, and that the last, which was at 460 Washington street, previous to which I had given him one or two others, the dates of which I do not recollect.

Cr.-int. 20 Did you give these one or two others while he was in the habit of coming to your place and drawing, and using pencil-erasers?

Ans. I must have given them to him on a visit at my rooms, but whether on said occasion he used this pencil-eraser or not, I can't state.

Cr.-int. 21. Do you recall any particular occasion anywhere on which he used this pencil-eraser?

Ans. I only remember it as a general fact of his using them during my occupancy of the rooms 94 Tremont street, and from the special fact that during that period there was quite a dispute between himself and Payson & Dunton regarding their systems of penmanship and copy-books, and I being familiar with both sides of the case, they w re all in the habit of coming to me, talking over the difficulties and illustrating their systems, frequently drawing out letters, or writing copies for the sake of this illustration; the Mr. Dunton I refer to as Payson & Dunton is a brother of Alvin R. Dunton.

Cr.-int. 22. That controversy is still going on, is it not, Mr. French?

Ans. It is.

451 Cr.-int. 23. One or more of the certificates you have spoken of was given during this controversy, was it not?

Ans. I think it was; I think you will find it printed in that book you hold in your hand.

Cr.-int. 24. Do you find in the book now handed you a copy of that certificate; and, if so, will you please read it?

Ans. I find in this book a copy of a certificate signed by myself with others on the sixth (6th) page, dated Boston, June 22d, 1858.

(The witness here proceeding to read the certificate referred to, the defendant's counsel objects to its being read separately and made a

part of the deposition unless the whole book containing said certificate be put in evidence by complainant.)

"We have examined the writing and system of penmanship taught by Mr. A. R. Dunton, and certify that it is substantially the same as that published by him in New Orleans in 1843, and the copies from which said publication was made are now in his possession, and have been shown to us, and we further certify that they far excel the engravings." Signed by Charles French, A. M., principal of French's Commercial Institute, 289 Washington street; George A. Sawyer, principal of Commercial Institute, 94 Tremont street; J. A. Spencer, A. D. Bill, teacher of penmanship and elocution at French's Comm'l Inst., 289 Washington street; C. A. Swett, engraver, 215 Washington street.

The magistrate hereby certifies, at the request of the counsel for complainant, that he has compared the certificate printed in the book, shown to and read by the witness, with the above copy taken down by him as the witness so read it, and that said copy is correct.

(The defendant's counsel here requests the magistrate to retain and mark for identification said book now in his possession. The magistrate certifies, at the request of the counsel for complainant, that when
452 said book was handed him by said complainant's counsel for the purpose of comparing the part read by the witness and certifying as above, said complainant's counsel stated distinctly that he did not yield up the custody of said book. The defendant's counsel protests against the counsel for the complainant being allowed to withdraw from the magistrate the said book which he has shown the witness, and as to a part of which he examined the witness, and which is now in the magistrate's possession, and against his right to submit and deliver it to the magistrate with any such condition.)

The magistrate here certifies, at the request of the defendant's counsel, that after he had certified, as in the last clause, and read the certificate aloud, the complainant's counsel took the said book from the magistrate's table, saying, as he did so, "Now, Mr. Magistrate, with your permission I will take my book;" to which he replied, "Well, Mr. Blake, I don't see how I can prevent you if you choose to take it;" also, that he neither gave nor refused his permission that said book should be so taken from his possession.

(The defendant's counsel now requires that complainant's counsel, who now has said book in his hands, restore the same to the magistrate to be identified, marked, and, by the magistate, retained, as previously requested. The complainant's counsel declines to so restore said book for that purpose.)

Cr.-int. 25. To the best of your recollection, is this copy of a certificate signed by yourself and others, dated Boston, June 22d, 1858, a true copy of the original certificate signed by you?

Ans. It is.

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 33. Was, in fact, your Commercial Institute in operation at 289 Washington street on the 22d of June, 1858?

453 Ans. I presume from the date of that certificate that it was. I can definitely ascertain by reference to my own records.

Int. 34. Did you have personal charge of it at that time, and were you engaged actively in carrying it on yourself?

Ans. If it was in existence at that date I had personal charge of it.

Int. 35. Are you now able to fix the period when you first saw and

during which you saw Mr. Dunton using his said pencil-erasers like Exhibit E any more accurately than you have already fixed it? And if so state, and state how you have refreshed your recollection as to the time.

Ans. I am, by means of an original certificate written and signed by myself and given to Mr. Dunton, which I now hold in my hand, from which I am enabled to state positively that it was during the period between July, 1852, and April, 1857, commencing with the first date.

(The original certificate is here offered in evidence by the defendant's counsel. It is agreed by both counsel that a copy to be made and certified by the magistrate be here entered upon the record and substituted for said original certificate. Said certified copy here follows:

BOSTON, *July 23d*, 1858.

GENTLEMEN: At the request of Mr. Dunton I make the following statements:

On the first day of July, 1852, I entered into partnership with J. W. Payson and Seldom Dunton, at 109 Washington street, and continued with them until December of the same year, during which time I opened a school at 94 Tremont street, and employed Mr. Payson as an assistant, as also Mr. S. Dunton afterwards.

I am very confident that the publishing or even mentioning of a chirographic chart by Payson & Dunton was not till after my connection with them. I remember very well the drawings of the letters on
454 separate pieces of paper. I remember going to Roxbury to see Mr. Angiel, or Engle, in regard to drawing a chart upon stone. I remember and can produce one of the first ever printed. One-third of the money paid Mr. Engle was from my pocket.

The only writing-book Payson & Dunton had published at the time of my entering into company with them was that afterwards numbered 3.

The book of notes, &c., I arranged myself, though they have since been changed. Some ideas connected with the chart were suggested by myself, and I was consulted in regard to all matters pertaining to it and to the writing-books.

I would moreover state that during my connection with Messrs. Payson & Dunton they made very many statements to me respecting A. R. Dunton, which I have since learned were entirely false, and I have, from my own personal experience, found that Mr. Payson is not a man to be trusted, either in word or act.

I have no interest in either party, and make the above statements only because I know Mr. A. R. Dunton has been greatly wronged and misrepresented by Payson, Dunton & Scribner, in proof of which I could mention very many circumstances which my time will not permit stating in writing.

Very respectfully, &c.,

CHARLES FRENCH, A. M.

A true copy of the original certificate referred to in the last answer and interrogatory.

F. DODGE,
Notary Public and Examiner.

APRIL 9th, 1873.

Additional cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

during which you saw Mr. Dunton using his said pencil-erasers like Exhibit E any more accurately than you have already fixed it? And if so state, and state how you have refreshed your recollection as to the time.

Ans. I am, by means of an original certificate written and signed by myself and given to Mr. Dunton, which I now hold in my hand, from which I am enabled to state positively that it was during the period between July, 1852, and April, 1857, commencing with the first date.

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On the first day of July, 1852, I entered into partnership with J. W. Payson and Seldom Dunton, at 109 Washington street, and continued with them until December of the same year, during which time I opened a school at 94 Tremont street, and employed Mr. Payson as an assistant, as also Mr. S. Dunton afterwards.

I am very confident that the publishing or even mentioning of a chirographic chart by Payson & Dunton was not till after my connection with them. I remember very well the drawings of the letters on
454 separate pieces of paper. I remember going to Roxbury to see Mr. Angiel, or Engle, in regard to drawing a chart upon stone. I remember and can produce one of the first ever printed. One-third of the money paid Mr. Engle was from my pocket.

The only writing-book Payson & Dunton had published at the time of my entering into company with them was that afterwards numbered 3.

The book of notes, &c., I arranged myself, though they have since been changed. Some ideas connected with the chart were suggested by myself, and I was consulted in regard to all matters pertaining to it and to the writing-books.

I would moreover state that during my connection with Messrs. Payson & Dunton they made very many statements to me respecting A. R. Dunton, which I have since learned were entirely false, and I have, from my own personal experience, found that Mr. Payson is not a man to be trusted, either in word or act.

I have no interest in either party, and make the above statements only because I know Mr. A. R. Dunton has been greatly wronged and misrepresented by Payson, Dunton & Scribner, in proof of which I could mention very many circumstances which my time will not permit stating in writing.

Very respectfully, &c.,

CHARLES FRENCH, A. M.

A true copy of the original certificate referred to in the last answer and interrogatory.

F. DODGE,
Notary Public and Examiner.

APRIL 9th, 1873.

Additional cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

455 Cr.-int. 26. Where was this certificate written?

Ans. It was written in Boston; I presume at 289 Washington street; I couldn't say certainly.

Cr.-int. 27. What part or paragraph of this certificate refreshes your recollection as to the date when you first saw Mr. A. R. Dunton use an implement like Exhibit E?

Ans. The first paragraph, containing the date July, 1852, taken in connection with my bill of sale to Spear & Sawyer.

Cr.-int. 28. Then the only manner in which it refreshes your recollection in respect to the use of the implement in question is that you now feel able to state that your first occupancy of the rooms, No. 94 Tremont street, lasted from 1852 to 1857?

Ans. It fixes in my mind definitely the period during which I was first at No. 94 Tremont street, and I am positive during that period that I saw these erasers used.

Cr.-int. 29. On reading the statements in this certificate that you opened in school at No. 94 Tremont street at the end of the year 1852, does that give you any fresh recollection of the said fact of so opening the school, or do you merely feel confident that the statement is correct because you find it stated in the certificate?

Ans. It doesn't add to my certainty of opening the school there at all; it simply helps me to fix the dates. I have no doubt about opening the school and the teaching of it there for several years.

Cr.-int. 30. On reading the statement, do you have any fresh recollection of that date, or do you merely feel confident that the date is correctly stated in the certificate?

Ans. I feel confident that the date is correctly stated in the certificate, but I was confident previously that it was about that time; this simply fixes the date in my mind.

Cr.-int. 31. Does it fix it in your mind in any other way than this, that, seeing the statement in the memorandum, you feel confident that the statement is correct, but have different or independent recollection of it after having read said statement than you had before?

456 (Objected to as a substantial repetition of the preceding question and as already fully answered.)

Ans. I feel positive that I should not have signed that certificate unless it had been true at the time; it therefore merely gives me, as I said before, the date definitely, which date, I presume, I can verify from other sources; I was previously positive that it was about that date when I opened my school at 94 Tremont street.

(Question repeated.)

I will add, if it will be any more definite, that it fixes the date in my mind as definitely as though I had ascertained the date from my lease of the rooms.

CHARLES FRENCH.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of GEORGE A. SAWYER, taken on behalf of the defendant, before Frederic Dodge, a notary public and special examiner of said court, at Boston, Massachusetts, on Tuesday, April 8th, A. D. 1873, Chas. F. Blake and Edmund Wetmore, esqs., appearing for complainant; John S. Washburn and P. Thacher, esqs., for defendant.

Direct interrogatories by Mr. Washburn for defendant, and answers of the witness thereto:

Int. 1. Please state your name, residence, and business.

457 Ans. George A. Sawyer; I reside in Boston; my business is that of an accountant and teacher of penmanship.

Int. 2. How long have you been so occupied?

Ans. For the past fifteen years in my present business; I have been a teacher for upwards of thirty years.

Int. 3. Do you know either of the parties to this suit?

Ans. I do not.

Int. 4. Do you know Alvin R. Dunton now present; if so, how long have you known him?

Ans. I do; I have known him since I have been in my present business, for upwards of fifteen years; I do not know when my acquaintance first commenced with him—some twenty years ago.

Int. 5. Please look at defendant's Exhibit E now shown you, and state whether you ever saw a pencil-eraser similar to that, having lead in the wood at one end and a rubber eraser in the other end; and, if so, when first and where?

Ans. I have seen a pencil like this; I saw it at my rooms in the hands of Mr. Dunton, and it was when I first commenced my present business, in the year, I think, 1857, in the spring; not positive about that, but I have papers that would fix the date exactly, I think, of my commencing my present business at 54 Tremont street; place formerly occupied by Mr. French, Mr. Charles French, the last witness; I purchased the school of Mr. French.

Int. What did Mr. Dunton do with it when you saw it, if anything?

Ans. He was engaged indoing some ornamental work—card-writing, I think; he was in the habit of coming into my rooms and doing some ornamental work, card-writing; I never knew him to come in and sit down without doing something of the kind.

Int. 7. In what manner did he use that pencil-eraser?

Ans. After using the pencil, the lead end, in drawing, he would sometimes shade with that end, and use the rubber part in toning down, in making the expression softer or for erasing.

458 Int. 8. Did you see him use more than one of these pencil-erasers or on more than one occasion; if so, how many and how often?

Ans. I did, but I cannot state the number of times or the number of pencils; he was in the habit of coming in often and using that kind of pencil. Observing some very nice work one time while he was doing it, I took up one of the pencils, and observed that it had the rubber in it, at one end. He often did ornamental work on cards and drawing scrolls, and shading with that kind of pencil, and on paper; he used both when he made those visits to my room, and his visits where part of the time quite frequent; they were not uniform; he seemed to have a variety of pencils that he used, and I have seen him at different times have several pencils with this rubber at one end.

Int. 9. For how long a time, commencing with your moving into your rooms 94 Tremont street, was Mr. Dunton accustomed to come there and use this kind of pencil, to your knowledge?

Ans. I cannot tell positively, but I should think for several months, and while he was in the city he was frequently at my rooms, particularly in the early part of the time that I commenced my school there; at times—there were times that he was absent from the city, and of course I did not receive visits from him then.

Int. 10. Were any others present when he so used said pencil-erasers; if so, how often, and how many?

Ans. I never knew him to work alone; he generally did this work in a public office, and there were always several persons present besides our pupils; I cannot state the number, but recollect that there were generally several present at the time; he did some work on some specimens that I had; made some alterations for me, and generally used this kind of pencil in doing some portion of it.

Int. 11. Have you such a pencil-eraser in your possession?

Ans. I have.

459 Int. 12. Please produce it; where and when did you procure it?

Ans. I do now produce it; I procured it of Mr. Dunton at my rooms within the past two or three weeks; while we were in conversation he took out a package of pencils of different kinds and asked me if any of them were like anything that I had seen him have; I picked out this one and told him it looked like the one, or was similar to the one I had seen him use.

(The pencil-eraser produced and referred to by the witness in answer in the above answer is offered in evidence by defendant's counsel, and has been identified and marked by the magistrate "Defendant's Exhibit G G.")

Int. 13. Do you know, and, if so, state what has been and is the reputation of Mr. Dunton as a draughtsman, penman, and teacher of penmanship?

Ans. I knew his reputation as a teacher of penmanship before I knew him personally, and his reputation, so far as my knowledge is concerned, is superior to that of any penman of whom I have ever heard in the United States; and the specimens of his work, his power of execution, and his system of teaching are superior to any that I have ever known, and are unexcelled.

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 1. Do you use, or have you ever used, Mr. Dunton's copy-book or system in your school?

Ans. I have used it as a regular copy-book when I taught in the public schools; his system is my system of instruction as nearly as possible, but in my present school writing from engraved copies is not so popular as the written specimens; my students generally write from copies written by myself.

Cr.-int. 2. When you have used his books have you procured them from or through him?

Ans. Not generally.

460 Cr.-int. 3. Are you positive you ever saw him use more than one of the pencils with lead at one end and rubber at the other?

Ans. I have seen in his possession several different ones, but I could not say positively whether he used the same one all the time.

Cr.-int. 4. When did you see in his possession several different ones?

Ans. On those occasions before referred to; when he came into my rooms at 94 Tremont street.

Cr.-int. 5. Did he always have more than one with him?

Ans. He had several of different kinds; I cannot say that he always had several of this kind every time he came; I have observed them at different times.

Cr.-int. 6. Do you remember any particular occasion when he had in his possession at the same time more than one pencil like Exhibit E?

Ans. I do.

Cr.-int. 7. When? and relate the circumstances.

Ans. It was on one of those occasions; I can't recollect the date; one lay on the table, and I picked it up and looked at it; it had lead in one end and rubber in the other, and I saw that he was using one of the same kind at the same time; I did not take in my hand the one that he was using, but I saw that he used the pencil end, and then turned and used the rubber end.

Cr.-int. 8. How long did you remain at 94 Tremont street?

Ans. About two years, and was at 96, next door, several years.

Cr.-int. 9. Did Mr. Dunton's visits extend over the whole time you were at those places?

Ans. Not so much after my removal to No. 96, as I think he was absent from the city a good deal, and I did not see so much of him, but the two years I was at No. 94 he was there considerable.

Cr.-int. 10. During the period that he used to visit your room did he use pencils having lead at one end and rubber at the other, and fastened by various devices?

461 Ans. I think I saw him sometimes have rubber that was tied into one end of the pencil; that is the only thing that I have the impression that he occasionally used them in that way, that is, with the lead taken out and a piece of rubber put in and a string tied round to hold it.

Cr.-int. 11. Did you ever see him use any with the rubber fastened by means of a metallic holder?

Ans. I have seen him have metallic holders such as crayons are held in sometimes, but I don't remember whether I saw him use one with India rubber held in or not; I have seen them on the table among his other pencils and implements.

Cr.-int. 12. Did he use an implement like Exhibit E every time he called?

Ans. I do not remember; he was occasionally doing pen work as well as pencil work, and I am not sure that he used that every time he called; that is more than I could possibly remember.

Cr.-int. 13. Can you fix the date of any one particular occasion when you saw him use them?

Ans. I cannot; I can only state approximate, the time.

Cr.-int. 14. Who asked you to testify in this case?

Ans. Mr. Thacher.

Cr.-int. 15. Did Mr. Dunton tell you anything about it when he showed you the pencil that you produced on your direct examination?

Ans. He spoke of the matter, but I do not recollect of his mentioning any particulars; I do not think he mentioned the parties to the suit or any particulars.

Cr.-int. 16. Was that before or after Mr. Thacher spoke to you about it?

Ans. After Mr. Thacher.

Cr.-int. 17. Was the occasion when he produced the pencil the only time when Mr. Dunton has mentioned to you the fact of his having formerly used such pencils?

Ans. I do not remember particularly; he has called to see me several times on other business, and he may have mentioned it.

462 Cr.-int. 18. What is your present employment, and where are you engaged?

Ans. I am a teacher of penmanship and accountantship at 161 Tremont street; I am principal of the school, and have been so ever since I commenced it; it is my own school.

GEORGE A. SAWYER.

On the following day, Wednesday, April 9th, said George A. Sawyer, recalled for further examination by agreement, further testified as follows:

Additional direct interrogatories by Mr. Washburn, for defendant, and answers of the witness thereto:

Int. 14. Are you now able to state accurately the date at which you commenced your business at 94 Tremont street?

Ans. I am; it was on the 18th day of April, 1857.

Int. 15. How do you fix it?

Ans. By the bill of sale of his school at that place, dated on that date, given me by Mr. French, and I continued his business at the same place.

Additional cross-interrogatories by Mr. Wetmore, for complainant, and answers of the witness thereto:

Cr.-int. 19. When did you take possession of his business?

Ans. I think it was immediately.

Cr.-int. 20. You speak of Mr. Dunton's coming into your rooms frequently when he was in town; after you took possession in 1857, how long was it before he went away?

Ans. I am not able to state; according to my recollection, when he did not make his visits so frequent as usual, he would say he had been out of town; I do not know whether he was permanently absent from the city for the first one or two years after my commencing that school.

GEORGE A. SAWYER.

463 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER, *vs.* EBERHARD FABER. } In equity.

The deposition of Samuel W. Gushee, taken on behalf of the defendant, at Boston, in the district of Massachusetts, before Frederic Dodge, a notary public and special examiner of said court, on Wednesday, April 9th, 1873, Chas. F. Blake and Edmund Wetmore, esqs., appearing for complainant; John S. Washburn and P. Thacher, esqs., for defendant.

Direct-interrogatories by John S. Washburn, and answers of the witnesses thereto:

Int. 1. Please state your name, residence, and business.

Ans. Samuel W. Gushee; Norton, Mass;, farmer.

Int. 2. Do you know either of the parties in this suit?

Ans. I do not. I thought Mr. Dunton was one of the parties. I do not.

Int. 3. Do you know Alvin R. Dunton, now present; and, if so, how long have you known him?

Ans. I do. I have known him ever since I was a very small boy and old enough to know any one.

Int. 4. Have you had any business connection with him; if so, what and when?

Ans. I have, sir; last winter I stopped with him several months; I mean a year ago last winter.

Int. 5. Please look at defendant's exhibit E, now shown you, and state whether you have ever before seen a pencil like this, having lead in one end and rubber in the other end; and, if so, when and where?

464 Yes, sir, I have; the winter I was with Mr. Dunton I saw him use them a great number of times; he also made one for me, which I used on some work that I was about.

Int. 6. Is that one which he made for you now here?

Ans. Yes, sir; this is it.

(Defendant's Exhibit FF is the pencil-eraser pointed out and referred to by the witness.)

Int. 7. When did he make and you receive that from him?

Ans. When I was with him at the time I have mentioned.

Int. 8. When you were so with him, how many of these pencil-erasers did you see him have and use in his business?

Ans. Well, I should think four or five, if not more.

Int. 9. Did you have any conversation at the time in regard to them; and, if so, what?

(Objected to as incompetent, irrelevant and hearsay.)

Ans. At the time he made my pencil I had a conversation. I inquired how long since he had used those and he told me for many years.

Int. 10. Did he tell you where he first got them; and, if so, what did he say?

(Same objection.)

Ans. He told me the first he ever saw of the kind he made himself.

Int. 11. Were any others present at the different times he used said pencil-erasers; and, if so, how many?

Ans. I think there was; well, a number that I knew were there, but whether they saw him use them or not, and noticed them is more than I can tell.

Int. 12. At what place and how did he use them?

Ans. At his writing-rooms, 34 School street.

Int. 13. How did he use them?

Ans. He used them in getting up his charts and in various other ways.

465 Int. 14. How did he use the respective ends of the pencil-eraser?

Ans. While he was getting up those capitals he had here—charts—he would cut a piece of paper to fit around the letter, in the shape of it, and take the rubber to take it off when he had shaded it too heavy; he used the lead end in writing the charts, the letters.

Int. 15. Do you know Francis H. Hale?

Ans. Yes, sir.

Int. 16. Did you ever see any of these pencil-erasers in his hands; and, if so, when, where, and under what circumstances?

Ans. I have, in the winter I was there, in 1871; I saw him take up a pencil and examine it and heard him inquire of Mr. Dunton—(any statement of what was said by Hale to Dunton objected to as irrelevant, incompetent, and hearsay)—if that was original of his; he told him it was; that was all the conversation on the subject.

(The same objection continued throughout the whole answer.)

Int. 17. What kind of pencil was it that Mr. Hale took up?

Ans. One of these kind of pencils.

(The witness here takes in his hand and refers to defendant's exhibit E.)

Cross-interrogatories by Mr. Wetmore for complainant, and answers of the witness thereto:

Cr.-int. 1. Who first asked you to testify in this cause?

Ans. Mr. Dunton.

Cr.-int. 2. Do you know M. R. Gushee?

Ans. Yes, sir; I do.

Cr.-int. 3. Is he any relative of yours? and, if so, please state.

466 Ans. He is my own uncle.

Cr.-int. 4. What was your business connection with Mr. Dunton when you stopped with him several months, a year ago last winter?

Ans. I took care of his room and he gave me lessons in penmanship and pen drawing.

Cr.-int. 5. His dwelling-room, or his writing-room, or both?

Ans. Both.

Cr.-int. 6. Did you live with him in his dwelling-rooms?

Ans. Yes, sir.

Cr.-int. 7. Anybody else except you and he there?

Ans. No permanent visitor; Mr. Hale used to be there pretty often and helped fix the rooms up somewhat.

Cr.-int. 8. Anybody else used to be there?

Ans. Yes, sir; there were two young ladies that took lessons in penmanship.

Cr.-int. 9. Was this at 34 School street?

Ans. Yes, sir; it was.

Cr.-int. 10. Was Mr. Dunton still living there when you left?

Ans. Yes, sir.

Cr.-int. 11. Were the charts you saw him strike like Exhibit O?

(Here shown the witness by magistrate.)

Ans. No, sir; they were not.

Cr.-int. 12. Were they similar in respect to size of the letters?

Ans. Yes, sir.

Additional direct interrogatories by Mr. Washburne for defendant, and answers of the witness thereto:

Int. Who, if any one, examined you as to your knowledge of this matter, and requested you to come here as a witness when sent for?

Ans. Mr. Peter Thacher.

Int. Where was that?

Ans. At this room.

SAMUEL W. GUSHEE.

467 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of Francis H. Hale, taken on behalf of the defendant, before Frederic Dodge, notary public and special examiner of said court, at Boston, in the district of Massachusetts, on Wednesday, April 9th, 1873; Chas. F. Blake and Edmund Wetmore, esquires, appearing for complainant; John Washburn and P. Thacher, esquires, for defendant.

Direct-interrogatories by Mr. Washburn for defendant, and answers of the witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Francis H. Hale; reside at present in this city. I am an engineer.

Int. 2. Do you know either of the parties to this suit?

Ans. I do not.

Int. 3. Please look at the pencil-eraser now shown you, "Defendant's Exhibit E," having lead in the wood at one end and rubber-eraser in the wood at the other end, and state whether or not you have ever before seen any similar pencil-erasers; and, if so, when and where?

Ans. I have; at 34 School street; at the rooms of A. R. Dunton. I first saw them in March, 1872.

Int. 4. How many did you then see, and where in his rooms?

Ans. At first only a single one, on the desk in his room; taking a pencil casually in my hand to write, I found it made no mark. I then spoke, and said, "This is a curious pencil; another novelty," I think, was
468 an expression I dropped at the time, as I recall my conversation. Having never seen an article of that kind before, I made inquiries to know how long such a pencil had existed. Mr. Dunton and Mr. Samuel W. Gushee were in the room at the time. I did not ask either of them particularly, but made a general inquiry. Mr. A. R. Dunton then explained to me the use the pencil was put to.

(Any statements of A. R. Dunton to the witness, or conversation between them, objected to as incompetent, irrelevant, and hearsay.)

Int. 5. Describe that pencil that you then took up and examined.

Ans. I saw nothing concerning the pencil, in the first place, different from any common pencil that I had ever handled. I then made the inquiries that I stated before. It was a pencil very similar to this one, (Exhibit E,) if not the same pencil. It was of red cedar. I couldn't swear but that might be the identical one. What appeared to be lead was in one end, and what appeared to be rubber in the other end.

Int. 6. Did you see any other of said pencil-erasers like this there at that time?

Ans. I saw a good many pencils and penholders on the desk before me; quite a number; such as you would see on any writing-desk. I did not take them all up to examine them separately.

Cross-interrogatories by Mr. Wetmore for complainant, and answers of the witness thereto:

Cr.-int. 1. Was it not that very pencil that you saw?

Ans. I wouldn't swear it was. I am quite sure there was lettering on it, but as to the name or stamp I couldn't swear what the reading was.

Cr.-int. 2. From the best of your recollection are you not pretty confident that it was that same pencil?

Ans. It seems to me that this is extra marking here that I don't
469 call to mind. I shouldn't think it was the same pencil; there's more lettering there than I call to mind on the one I saw.

Cr.-int. 3. How long have you been an engineer?

Ans. Since 1857.

Cr.-int. 4. Where have you carried on that profession?

Ans. At the time I was first made engineer it was on the Boston & Providence Road, Dedham train.

Cr.-int. 5. By engineer do you mean civil engineer?

Ans. No, sir; railroad engineer; locomotive engineer.

Cr.-int. 6. Were you living at the rooms 34 School street, where Mr. Dunton lived, at this time?

Ans. Not at that time.

Cr.-int. 7. Did you ever live there?

Ans. I stopped there some two weeks or two weeks and a half; I'm not positive about the time I went in there; it was somewhere about the middle of March; it was several weeks.

Cr.-int. 8. Was Mr. Dunton still living there when you left at the conclusion of your visit?

Ans. I left the building the same day that he did.

Cr.-int. 9. Do you know what was the occasion of his leaving?

Ans. His lease expired.

Cr.-int. 10. Was Mr. Gushee there at that time?

Ans. Mr. Gushee was there when I first became acquainted there.

Cr.-int. 11. Was he there during your visit?

Ans. He was there the first few days that I became acquainted.

Cr.-int. 12. Was any one else there during your visit?

Ans. Several parties were out and in there; no one permanently.

Cr.-int. 13. How long were you engaged on the Dedham branch as locomotive engineer, and what did you next do?

Ans. I was engaged about the branch nearly nine years in different capacities, the last of which was engineer, nearly four years engineer and fireman. I next was sick a year.

470 Cr.-int. 14. Have you been employed since that time?

Ans. I've been in different capacities.

Cr.-int. 15. In what capacities and where?

Ans. I've sold goods by sample in this city and in various towns throughout the Commonwealth.

Cr.-int. 16. Have you been engaged in any other business than so selling goods since?

Ans. I have.

Cr.-int. 17. What and where?

Ans. I've run a stationery engine, and have also acted as clerk in a grocery store.

Cr.-int. 18. What was the nature of your sickness?

Ans. Trouble of the kidneys.

Cr.-int. 19. Did you apply for a position as locomotive engineer from your former employees on your recovery?

Ans. I did not.

Cr.-int. 20. Was sickness the only cause of your leaving?

Ans. The only cause; my own request and poor health.

Cr.-int. Why did you not apply to be reinstated?

Ans. I was in a neighboring State when I recovered my health, under the advice of a physician; finding that I couldn't stand the jar, I've never been on a locomotive since.

FRANCIS H. HALE.

UNITED STATES OF AMERICA,

State and District of Massachusetts, Suffolk County, ss:

I, Frederic Dodge, a notary public within and for said county and State, duly commissioned and sworn, do hereby certify:

That in a certain civil suit in equity pending in the circuit court of the United States for the southern district of New York, wherein

471 Joseph Reckendorfer is complainant, and Eberhard Faber is defendant, being duly appointed a special examiner under the 67th rule of said court to take testimony in said cause in said district of Massachusetts, as by the annexed copy of an order of said court appears, and being duly furnished with a copy of the bill and answer in said cause, on the 5th, 6th, 7th, and 8th of March, and afterward by adjournment agreed upon by the counsel for both parties in said suit, on the 8th, 9th, and 10th of April, A. D. 1873, as in the foregoing annexed depositions more particularly appears, at the office of Messrs. P. and S. Thacher,

No. 14 Pemberton Square, in Boston, in said county, personally appeared the before-mentioned Lavinia B. Pendleton, Octavia O. Sprague, James A. Page, Charles A. Evans, Silas C. Thomas, Alvin R. Dunton, Benjamin F. Lord, John M. Whittemore, George A. Sawyer, Charles French, Samuel W. Gushee, Francis H. Hale, Rachael B. Thomas, witnesses for the defendant in the above-named action, each being of sound mind and lawful age, who being by me duly examined, cautioned, and sworn to testify the whole truth relative to the issue in the cause aforesaid, gave the foregoing depositions in answer to interrogatories and cross-interrogatories proposed by the counsel for said complainant and defendant, respectively, before named.

That the testimony given by each of said witnesses was by me reduced to writing in presence of the deponent, and afterwards read over by me to said deponent, and said deponent afterwards subscribed the same in my presence and the presence of said counsel as and for his deposition. Said witness Benjamin F. Lord being confined to his house in Boston by sickness, his deposition was by consent taken there.

472 That the reason for taking said deposition was that said suit above named was in equity, and that the said witnesses above named reside at or near said Boston or in the district of Maine, and all more than one hundred miles from the place of trial of said cause, and that their testimony is material and necessary in said cause.

That said depositions were taken at the request of said defendant and by consent, and said complainant was present at the taking said depositions by said Charles F. Blake and Edmund Wetmore, esquires, his solicitors, who put interrogatories as they thought fit, due service of a copy of the annexed notice being by them admitted. That I have retained the said depositions and the exhibits therein referred to and identified as stated therein in my possession for the purpose of forwarding them under my hand to the court for which they were taken.

I further certify that I am not of counsel nor attorney for either of the parties in the above cause, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and affixed my notorial seal this 10th day of April, A. D. 1873.

FREDERIC DODGE,
Notary Public and Examiner.

Fees:

Lavinia B. Pendleton, travel 2 m., att. 1 day	1 70	
Octavia O. Sprague, tr. 2 m., att. 1 day	1 70	
James A. Page, tr. 1 m., att. 1 day	1 60	
Charles A. Evans, tr. 5 m., att. 2 days	3 50	
Silas C. Thomas, tr. 1 m., att. 2 days	3 10	
Alvin R. Dunton, tr. 1 m., att. 6 days	9 10	
Rachel B. Thomas, tr. 200 m., att. 1 day	21 50	
Benjamin F. Lord, , att. day	1 50	
John M. Whittemore, tr. 1 m., att. 1 day	1 60	
Geo. A. Sawyer, tr. 1 m., att. 2 days	3 10	
473 Chas. French, tr. 1 m., att. 3 days	4 60	
Francis H. Hale, serv. summons, 75 c.; tr. 1 m., att. 1 day	2 35	
Samuel W. Gushee, tr. 30 m., att. 2 days	6 00	
		61 35
Magistrate, taking		95 00
		$156 35

I further certify that in pursuance of the agreement in writing by said counsel in the above cause, dated April 14th, 1873, and hereto annexed, I transmitted the foregoing testimony and said exhibits to said E. G. Thompson, esq., examiner, this 17th day of April, 1873.

F. DODGE,
Notary Public and Examiner.

U. S. circuit court, southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Proofs for final hearing on the part of the defendant in the above-entitled cause, taken before Edward G. Thompson, one of the standing examiners of this court.

NEW YORK, *March* 18, 1873—11 a. m.

Present, John S. Washburn, esq., of counsel for defendant; E. Wetmore, esq., and C. F. Blake, esq., of counsel for complainant.

474 Counsel for defendant offers in evidence Exhibits A, B, and C, which were referred to and marked as above, in the testimony taken on the part of the complainant.

Also, certified copy of letters-patent granted Daniel F. Pond, dated September 21st, 1852, No. 9277, marked "Defendant's Exhibit Q, E. G. T., ex'r."

Also, certified copy of the specifications and drawing in the matter of the application of Joshua Gray, filed September 18th, 1856, for improvement in pencils, pencil-casers and holders, marked "Defendant's Exhibit R, E. G. T., ex'r."

GEORGE W. DICKSON, a witness produced on the part of the defendant, being duly first sworn, in answer to interrogatories propounded by Mr. Washburn, deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. George W. Dickson. I am 49 years of age. I reside at that part of Jersey City formerly called Bergen Hill. I am a pocket-book manufacturer.

2. Q. Please look at the article now shown you and state if you ever saw such an article before; and, if so, when first.

A. About 1856.

3. Q. What time in 1856?

A. In the spring of 1856.

4. Q. Where?

A. I saw them at 133 William street, New York; Eberhard Faber's store.

5. Q. What was your employment at that time?

A. I was in his employment at that time. I was a general clerk.

6. Q. When did that employment commence and when terminate?

A. It commenced in March or February, 1852 or 1853, and ended in 1859.

7. Q. What acquaintance did you have with this article after the time you first saw it in the spring of 1856?

475 A. I was salesman of the article. It was sold as an article of trade in his business from the spring of 1856.

8. Q. Did it continue to be an article of sale in Mr. Faber's business during the remainder of the time you remained with him?

(Objected to as leading.)

A. Yes, sir.

9. Q. To what extent, if at all, have you known it as an article of sale in the trade since you first saw it to the present time?

A. I could not state to what amount it has been sold, but it has been an article of sale in the trade to some extent from then until the present time.

10. Q. Prior to your present occupation as a pocket-book manufacturer what was your business?

A. I was in the pencil or stationery business after leaving Mr. Faber for about a year and a half, and then went into the pocket-book business.

(The article referred in the previous questions to this witness offered in evidence and marked defendant's exhibit S, E. G. T., exr.)

11. Q. Previous to your first seeing an article like Exhibit S, was there any similar article in the market? and, if so, describe it, and state when you first knew it, and for how long after, as an article of sale in the trade.

A. There was similar to this a pencil with black rubber made by A. W. Faber, which pencil I have known previous to my going with Mr. E. Faber in 1852 or 1853, as an article of sale in the trade, and we sold it up to the time of the introduction of the article like Exhibit S, which took the place of it.

12. Q. Did that pencil referred to differ in any respect from Exhibit S, except that the rubber was black instead of the vulcanized rubber, as in Exhibit S; and, if so, how?

476 A. The style was the same. The only difference I know was in the color of the rubber, which was black in that, and is white in this.

13. Q. Please look at the article now shown you, being a pencil containing in one end a rubber pencil-eraser, and in the other end an ink-eraser, and state if you ever saw such an article before, or knew it to be an article of sale in the trade; and, if so, when first, and for how long?

A. In connection with the other pencil, it came out about the same time, and I make the same answers as to this as to the other pencil. It was an article of sale in the trade, and sold by Mr. Faber at that time and subsequently.

(Counsel for defendant offers the pencil above referred to in evidence, marked "Defendant's Exhibit T, E. G. T., exr.")

14. Q. Please look at the article now shown you, and state if you ever saw such an article before as an article of sale in the trade; and, if so, when first, and for how long, and what is your knowledge?

A. I sold that pencil in August, 1857, perhaps before; but that I can swear to. I sold it for Mr. Faber. I was in his employment at that time. This was a very prominent article of sale in the trade at that time and during all the time I was with him. Some were stamped A. W. Faber plain, as this is, and some were stamped with the same, some in silver and some in gilt.

15. Q. How do you fix 1857, as you have testified, as the time when you commenced selling these?

A. From my handwriting in the Faber sales book.

(Counsel for defendant offers the pencil above referred to in evidence, marked "Defendant's Exhibit U, E. G. T., exr.")

16. Q. Please look at the sales book now shown you, and state if that is Mr. Faber's sales book, referred to in your last answer.

A. Yes; it is.

477 (The book marked for identification "E. G. T., exr., March, 1873.")

17. Q. Please look at the entries of sales of "penholders with pencils" in 1857 in that book, under dates August 28th, September 24th, October 14th, October 17th, May 1st, 1858; August 2d, 1858; September 23d, 1858; November 13th, 16th, and 19th 1858; November 29th, and December 11th, 1858, and state which of them were made by you, if any, and are in your handwriting.

A. I do so; the entries of October 17th, 1857, May 1st, 1858, and August 2d, 1858, are in my handwriting. The entries of August 12th, 1857, September 24th, 1857, October 14th, 1857, are in the handwriting of Charles Gercken; the other entries I do not recognise the handwriting of.

And being cross-examined by counsel for complainant, deposes and says:

18. X Q. What is your present business, and how long have you been engaged in it?

A. My present business is pocket-book manufacturer; I have been engaged in it some seven or eight years; I am not positive which; I would have to refer to my books to find out.

19. X Q. At what place or places have you carried it on?

A. I can give you the streets but I can't give you the numbers; in Fulton street, in Maiden Lane, William street, and at the corner of Greenwich and Cortland streets, and now at the present time at No. 44 Cortland street, all in the city of New York.

20. X Q. Immediately preceding your engaging in the pocket-book business, in what business were you engaged and where?

A. When I was in business (I was unemployed for some little time) I was in the employment of the Eagle Pencil Company, Berolzheimer, Illfelder & Co. I was with them I think about a year and a half. Immediately preceding that I was unemployed for about a year, and im-

478 mediately before that I was in the employ of Mr. Faber, as already testified by me in my direct examination.

21. X Q. How do fix the date of your first seeing Exhibit S as the spring of 1856?

A. I only fix it from the sales; by sales I mean the entries of sales in the book.

22. X Q. You have no recollection of any particular sales, aside from those entries at that time?

A. No, sir.

23. X Q. Did you yourself make any of the entries of the sales of this Exhibit S?

A. I can't say I did. I can't tell without examining the books. I knew that they were sold in the house.

24. X Q. You have not then examined the books to look for the entries of sales of the goods of which Exhibit S is a specimen?

A. I have not made an examination of the book; no, sir.

25. X Q. Do the answers which you have made in regard to Exhibit S by reference to your recollection of the sales of the same apply also to the eraser mentioned by you in your direct testimony as substantially identical with Exhibit S, except that the rubber was black instead of white?

A. I don't understand the question.

26. X Q. Have you any recollection of any particular sales of the eraser with black rubber at the end, mentioned by you in your direct examination, aside from the entries in Mr. Faber's books?

A. No other recollection of particular sales.

27. X Q. Have you, aside from the books, any recollection of the dates at which the sales of the article last mentioned were made?

A. No, sir.

28. X Q. Did you yourself make any of the entries of the sales of the eraser like Exhibit S, except the rubber was black?

A. I can't say; I would have to refer to the books to know.

479 29. X Q. You have not yet referred to the books to ascertain?

A. No, sir.

30. X Q. The entries identified by you in the sales book here present, marked for identification with the initials of the examiner, being Mr. Faber's sales book for the years 1857 and 1858, were all entries of sales of Exhibit U, were they not?

A. Yes, sir; they were penholder and pencil like that.

31. X Q. Have you any recollection, aside from the books of account, of the date of the sales of Exhibit T?

A. No, sir.

32. X Q. Have you found any entries in your own handwriting of sales of Exhibit T.

A. I have not looked.

33. X Q. You have not then examined the books for the purpose of finding the entries of sales of Exhibit T?

A. No, sir.

GEO. DICKSON.

Subscribed and sworn to this 18th day of March, 1873.

E. G. THOMPSON,
Examiner.

Counsel for defendant offers in evidence letters-patent granted to Philip Hufeland, dated February 18th, 1873, No. 136,122, marked "Defendant's Exhibit X, E. G. T., exr."

Also assignment of said patent, Exhibit X, then applied for by said Philip Hufeland to the defendant, Eberhard Faber, dated April 24th, 1871.

(Proof of execution waived by counsel for complainant.) Marked "Defendant's Exhibit W, E. G. T., exr."

EBERHARD FABER, the defendant, being first duly sworn, in answer to interrogatories propounded by Mr. Washburn, deposes and says:

480 1. Q. What is your name, age, residence, and occupation?

A. Eberhard Faber. I am 50 years of age. I reside at Port Richmond, Staten Island. I am a manufacturer of lead pencils and importer of stationery.

2. Q. How long have you been so, and where?

A. Since 1851, at 133 William street, in the city of New York.

3. Q. Please look at defendant's exhibit S, now shown you, and state whether you have ever known such a pencil as an article of sale in the trade; and, if so, when, and your means of knowledge.

A. I have seen such a pencil as an article of trade ever since some time previous to June, 1856. I know that it was and is an article of trade, because I have been selling them during the period stated, in my store, 133 William street.

4. Q. Please produce a list of said sales prior to January, 1857.

A. I do produce such list.

(Counsel for defendant offers the list in evidence, marked "Defendant's Exhibit Y, E. G. T., exr.")

5. Q. Prior to June, 1856, was any article similar to Exhibit S, an article of sale in the trade; and, if so, during what previous time, and state your knowledge and describe it.

A. There was a similar article sold with a black piece of rubber instead of a white one ever since I have been in business here in this country, and it was sold by me during that time, and I sold it until I got acquainted with the white vulcanized rubber here, of which I procured samples and sent them to the factory in Germany to be substituted for the black rubber. These black rubber pencils sold very well in Europe, but not here, and that was the reason I sent this vulcanized rubber which had been sold here for some time in square pieces (it was called stationer's rubber) in preference to the black.

481 6. Q. Look at the article now shown you, being a pencil similar to Exhibit S, with the exception that it contains in it an ink-eraser instead of a rubber pencil-eraser; and state if you have ever known it as an article of sale in the trade; and, if so, when, and state your knowledge.

A. I have known these ink eraser pencils to be an article of trade about just as long as the other one, Exhibit S, and have been selling them during the same time in my store, 133 William street.

(Counsel for defendant offers in evidence the pencil above referred to, marked "Defendant's exhibit Z, E. G. T.,, exr.")

7. Q. Look at defendant's exhibit T, being a pencil with a rubber pencil-eraser contained in one end, and an ink-eraser contained in the other end; and state if you have known such pencil to be an article of sale in the trade; and if so, when, for how long, and state your knowledge.

A. I have been selling similar pencils, with half ink and half pencil eraser in my store in New York during about the same time as the other two, and ever since that time it has been an article of sale in the trade.

8. Q. Look at defendant's exhibit, Exhibit U, now shown you, being a pen-holder and pencil of conical or tapering shape, combined, and state if you have known such article to be an article of sale in the trade; and if so, for how long, and state your knowledge.

A. I have imported and kept for sale these pencils and penholders combined since and ever since June or July, 1857. I imported them and sold them in three different qualities, one being with a gilt stamp, A. W. Faber, and with a gilt tip; the other one with a silver stamp and silver tip, and the third one with a plain stamp and a steel tip like Exhibit U.

482 9. Q. Please produce a list of your sales appearing on your books, of pencils like Exhibit U, of the different qualities from the commencement of your sale thereof, as stated in your last answer until 1862.

A. I do produce such a list.

(Counsel for defendant offers the list in evidence, marked "Defendant's Exhibit AA, E. G. T., exr.")

10. Q. Have you always kept, and have still the pen-holder pencils like Exhibit U, in stock?

A. Yes, I have.

And being cross-examined by counsel for defendant, deposes and says:

11. X Q. Are you the defendant in this case?

A. I am.

12. X Q. You are now, or were formerly, the president of the Rubber-Tip Pencil Company?

(Objected to as immaterial and irrelevant.)

A. Yes, I was, and am still.

13. X Q. The Rubber-Tip Pencil Company was formerly the holder of the Lipman patent, was it not?

(Same objection.)

A. Yes.

14. X Q. Being the same patent, the extension of which is in this suit?

(Same objection.)

A. Yes, sir.

15. X Q. The Rubber-Tip Pencil Co. instituted suits on this patent as well as others?

(Same objection, and also as incompetent.)

A. If it did, that patent was of very little consequence. I could not tell positively whether they did or not.

16. X Q. Did you not swear to the complaint in those suits?

(Same objection as the last.)

483 A. I did.

17. X Q. Did you not swear to the complaint in the suit of the Rubber-Tip Pencil Company against Samuel D. Hovey and Elbridge S. Hovey.

(Same objection.)

A. I did.

18. X Q. Was not that suit brought on the Lipman patent with others?

(Same objection.)

A. Yes, it may have been mentioned with all the other patents, but being of so little importance in that suit I did not pay any attention to it, and therefore I can't recollect now.

EBERHARD FABER.

Subscribed and sworn to this 18th day of March, 1873,

E. G. THOMPSON,
Examiner.

Circuit court of the U. S., southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

UNITED STATES OF AMERICA,
District of Columbia, County of Washington, ss:

Be it remembered that on this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-two, I, Ed-
484 mund F. Brown, a commissioner of the United States for the District of Columbia, under all the acts of Congress providing for and authorizing the appointment of commissioners, and prescribing the powers and duties of the same, duly appointed by the supreme court of the District of Columbia, did call and cause to be and personally appear before me, at my office, No. 637 F street, northwest, in the city of Washington, in said District, Joseph H. Adams, esq., and General Charles Everett, to testify and the truth to say on the part and behalf of the de-

fendant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of New York, wherein Joseph Reckendorfer is plaintiff and Eberhard Faber is defendant, when the following proceedings were had, viz:

JOSEPH H. ADAMS, esq., being duly sworn, doth depose and say, in in answer to interrogatories by John S. Washburn, esq., solicitor for defendant, as follows:

1st int. What is your name, age, residence, and occupation?

Ans. My name is Joseph H. Adams. My age is fifty-four years. My residence, Washington City. My occupation, examiner of interferences in the U. S Patent-Office.

2nd int. For how long has that been your occupation?

Ans. Since July, 1870.

3rd int. Prior to that, what was your occupation, since 1849?

Ans. In the spring of 1849 I was appointed a draughtsman by the Clerk of the House of Representatives, and was engaged in making a map of the State of Mississippi, from the original surveys. I was employed upon that work for about two years, of which time I was in the General Land-Office about a year and a half, where I had access to the books containing the surveys. After that time I completed the map by contract, and was engaged the remainder of the time in Mr. Z. C. Robbins' office, in the city of Washington. After a short interval I was then appointed to a position in the Pension-Office, which I
485 held about two years. I then was engaged in business as an architect and solicitor of patents until some time in 1854, when I entered the General Land-Office as draughtsman, in what is called swamp land division, where I continued until July, 1856, when I was appointed assistant examiner in the U. S. Patent-Office. I held that position until about 1862, when I was appointed to principal examiner, and placed in charge of Patent Office reports, where I continued until about the latter part of 1865, when I removed to Boston and entered into business as solicitor of patents. I continued these until August, 1868 when I was appointed to take charge of the preparation of Patent-Office Reports, in which business I continued until July, 1870, when I was appointed examiner of interferences.

4th int. To what extent did all these occupations require the duty or practice of a draughtsman?

Ans. While I was engaged in making the map, and while I was in the Land-Office, I was practically engaged in making drawings; while an architect and solicitor of patents I had my drawings made by other persons.

5th int. Have you ever used a pencil having in any way combined with it an eraser, and if so, when first?

Ans. I have. I think it was first in 1849, but it might have been not until 1850.

6th int. Please describe that pencil and eraser which you first used as stated, and produce, if able, a specimen of it?

Ans. On the head of an ordinary lead pencil I placed what was called a barrel pen with the point broken off, making a metallic cylinder, in the other end of which I placed a small piece of India rubber or erasive material which I whittled down so as to fit within the cylinder where it was here held fast, and leaving a portion of it projecting from the cylinder for the purpose of erasing pencil marks. I have present the specimen which I have recently made, corresponding as nearly as I can recollect, with the original article made by me.

(Defendant's counsel here offers the said specimen in evidence, and it is marked "Defendant's Exhibit A, Dec. 4, 1871, E. F. B. com.")

486 7th int. What has become of said original pencil-eraser of which Exhibit A is a specimen?

Ans. I think it is among my effects in Boston, but I am not sure.

8th int. Has it been in your possession ever since your first use of it?

Ans. I have never put it out of my possession. So far as I know, it is still in my possession.

9th int. To what extent did you use that pencil-eraser in making the map you have mentioned in 1849 and subsequently?

Ans. I had it on my desk so that I could use it constantly, and used it as occasion required while making the map.

10th int. Ever since then have you continued to use the said pencil-eraser so far as occasion required?

Ans. I probably have as occasion required, but my recollection of it is more particularly in connection with the map.

11th int. For how long a time in connection with the map did you have the said pencil eraser constantly on your desk, and did you continue to use the same as occasion required?

Ans. I think it must have been at least a year, and I presume I had it in constant use during that time.

12th int. To what extent was that pencil-eraser and your use of it open and accessible to the public?

Ans. While making the drawings I occupied a room in the third story of the Treasury building, in which the General Land-Office was then located. I occupied the room in connection with two or three other draughtsmen, and, like all public offices, it was open to all who chose to enter.

13th int. Who were, as far as you remember, the other draughtsmen occupying the said office?

Ans. Mr. Charles Everett was one of them; a Mr. Easton, as near as I can recollect; I cannot recall the name of the other.

14th int. Is the Charles Everett whom you have mentioned the gentleman of that name who is now present?

487 Ans. He is.

15th int. Is the Mr. Easton you have mentioned now living?

Ans. I do not know anything about him. I think he went to California the last I heard of him.

15th int. Did the other gentlemen who were in the office with you at that time see and examine the said pencil-eraser?

Ans. I don't know whether they did or not.

16th int. Was it exposed to the inspection of them and any others who came into the office during that time?

Ans. I presume it was on my desk with the other tools that I was using, so that any one could have seen it who came near the desk.

17th int. To what extent in fact were the public accustomed to come into the said room and about your desk during that time?

Ans. With the exception of personal friends who came to see us and a few employees of the office, there was no occasion for any of the public to come into the room.

18th int. For what purpose did you use the paper-tube on Exhibit A?

Ans. For the purpose of protecting the lead point when not in use, and as a holder for the fingers when in use.

At 1.30 p. m. adjourned to 2 p. m.

Met pursuant to adjournment.

Cross-examin tion by Edmund Wetmore, esq., counsel for complainant:

1st X int. How many articles did you make similar to defendant's exhibit A?

Ans. I don't remember absolutely of making more than one.

2nd X-int. When did you last see the original article of which Exhibit A is intended to be a model?

Ans. I have no recollection.

3rd X-int. Have you any distinct recollection of having seen it
488 at all since you ceased using it when drafting the map to which you have referred in the year 1849 or 1850?

Ans. I have no distinct recollection.

4th X-int. Will you be kind enough to turn your chair so that you look out at the window or in any direction not facing the commissioner's desk, and please state whether you can give any description of the construction of the four pens and two pencils which are at the side of the commissioner upon his desk, and which have been there during the time that you have been giving your testimony or of the pen which the commissioner has been using, or of any other visible article upon the said desk?

(Objected to by Mr. Washburn on the ground of its intrinsic absurdity and an assumption of facts not proved.

Ans. I will turn my chair as requested. I could not give any description which would indicate any peculiar construction of the pens; I don't know how many pencils are on the desk. I saw the paper on which you write and the pen which you hold, but cannot describe whether it is a gold pen or a steel one.

Redirect examination by Mr. Washburn.

19th int. As a matter of fact are not the pens and pencils referred to in the last cross-interrogatory as upon the commissioner's desk actually in a recess behind and sunk several inches below the surface of the top of the desk nearest you?

Ans. They appear to be.

JOS. H. ADAMS.

Sworn to and subscribed before me this fourth day of December, 1872.
[L. S.] EDWARD F. BROWN,
U. S. Commissioner.

489 General EVERETT, being duly sworn, doth depose and say, in answer to interrogatories by John S. Washburn, esq., counsel for defendant, as follows:

1st int. What is your name, age, residence, and occupation?

Ans. My name is Charles Everett. My age is sixty years; my residence, Washington City; my occupation a patent attorney.

2d int. What was your occupation in 1849 and 1850?

Ans. I was engaged as a draughtsman for the House of Representatives upon maps of the land States.

3d int. Have you heard the testimony of the preceding witness, Jos. H. Adams, and are you the Charles Everett, whom he has testified as being employed in that same room during that period with himself?

Ans. I have heard the testimony, and am the same Charles Everett referred to by him.

4th int. Please look at defendant's exhibit A now shown you, and

state whether you saw the pencil-eraser similar to that exhibit, which said Adams has testified to having used in said office during said period; and, if so, how often you saw it, and who, if any one, showed it to you first?

Ans. I have frequently seen in Mr. Adams' possession, and on his desk, a pencil similar to this exhibit, but do not recollect positively whether the sleeve or cylinder was composed of part of a barrel pen, or something else; but it was a thin metal'ic cylinder slipped on to an ordinary lead pencil, with a piece of India rubber fitted into the end of it. This was in 1849 and 1850. I do not remember who first showed it to me.

5th int. Did Mr. Adams, during that time, show it to you?

Ans. Whether Mr. Adams first showed it to me I do not recollect, but I have seen him using it and seen it on his desk.

6th int. Was that pencil-eraser, and its use, open to observation and examination by the other persons employed in said room and by persons coming into said room during said period?

490 Ans. It was.

7th int. Did you, yourself, use any similar device for an eraser during that time; and what?

Ans. I did. I owned a pencil which contained in the interior a slip of India rubber in the space usually occupied by the leads.

8th int. Of what material was the pencil-holder containing said eraser within it composed?

Ans. Cedar wood.

9th int. How did you expose a surface of the rubber therein for use?

Ans. By cutting away the wood in the ordinary manner of sharpening a lead pencil.

10th int. How long did you continue to use that pencil?

Ans. During all the time I was engaged upon those maps and for many years afterwards.

11th int. Was that pencil and its use by you open to the observation and examination of the other persons employed in that office, and of any persons coming into that office during that period?

Ans. It was.

12th int. Are the persons then employed in that office, other than yourself and Mr. Adams, still living, or what has become of them?

Ans. I cannot tell.

13th int. What has been your occupation generally since that time?

Ans. That of patent attorney until 1861; from that time until 1865, I was engaged in the Army; in 1866, I was appointed in the Patent-Office as an assistant examiner, afterwards promoted to principal examiner, in which position I remained until the beginning of the present year.

14th int. Do you know Lewis S. Robbins, of New York City?

Ans. I do.

15th int. Did he ever apply to you to make an application for him as his patent attorney, for a combined pencil and eraser; and, if so,

491 when, and describe it? or consult with you with reference to a proposed application?

(Objected to by Mr. Wetmore as hearsay.)

Ans. Mr. Robbins applied to me for my opinion of the patentability of the device which he exhibited to me, consisting of an ordinary lead pencil with a sleeve or tube slipped over the end of it, which was made of India rubber, and intended to serve as an eraser; the time as near as I can fix it was in 1858.

Cross-examination by Mr. Wetmore.

1st X-int. When were you first engaged as a draughtsman for the

House of Representatives as mentioned in your answer to 2nd interrogatory.

Ans. In 1848 or 1849.

2nd X-int. Where and how were you engaged immediately preceding your engagement as such draughtsman?

Ans. I was attending to a lawsuit of my own, which occupied several years, in Massachusetts.

3rd X-int. Where and how were you engaged prior to said lawsuit?

Ans. I was engaged in a very heavy mercantile business in London, England, and came from there in 1837.

4th X-int. Where did you learn the business of a draughtsman?

Ans. At school.

5th X-int. Then you were not employed in that profession as a matter of business until you took the position as draughtsman for the maps to which you have already referred?

Ans. No, sir.

6th X-int. What were your particular duties in regard to the execution of the maps, and while engaged as a draughtsman for the House of Representatives as you have mentioned?

Ans. Drawing the maps.

492 7th X-int. Where did you procure the pencil referred to in your answer to the 7th interrogatory, and described as containing in the interior a slip of India rubber?

Ans. I do not recollect where I bought it.

8th X-int. Did you buy it before or after your engagement as draughtman?

Ans. I believe it was after I was so engaged.

9th X-int. Have you any reccollection how long after your engagement you bought it?

Ans. Immediately after being so engaged I went on to Boston and there purchased the instruments, &c., necessary for drawing those maps; my impression is that at that time I bought that pencil.

10th X-int. Have you no recollection of the person from whom or the locality or establishment at which you made that purchase in Boston?

Ans. I bought them at several different places; Widdifield was one; King was another. I bought several pencils at that time. Their establishments were in Washington street, I think; Widdifield was, I know.

CHARLES EVERETT.

Sworn to, and subscribed before me, this fourth day of December, 1872.

[L. S.] EDWARD F. BROWN,
U. S. Commissioner.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Edmund F. Brown, a United States commissioner for the District of Columbia aforesaid, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, the witnesses are material and necessary in the cause in the caption of the said depositions named, and that the same were taken by consent and in the presence of the respective counsel.

I further certify that a notification of the time and place of taking the said deposition signed by me was made out and served on the plaintiff's counsel to be present at the taking of the said deposition, and to

493 put interrogatories if he or they might see fit, and the said counsel did attend, and did cross-examine the said witnesses.

I further certify that during the taking of said deposition, I was attended by John S. Washburn, esq., solicitor for defendant, and A. Pollok, esq., and Edmund Wetmore, esq., solicitors for plaintiff, and by the witnesses, who are of sound mind and lawful age, and the witnesses were by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of certifying the same to the court for which the same were taken.

And do hereby certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and official seal this fourth day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States, the ninety-seventh.

EDMUND F. BROWN,
U. S. Commissioner for District of Columbia.

494 U. S. circuit court southern district of New York.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Proofs on the part of the defendant in the above-entitled cause taken before Edward G. Thompson, one of the examiners of this court, under and pursuant to 67th rule in equity, as amended.

NEW YORK, *May* 13, 1873.

Present, counsel for both parties.

JAMES SUMNER, being produced as a witness on the part of the defendant, and being first duly sworn, in answer to interrogatories propounded by Mr. Washburn, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. My name is James Sumner. My residence is Milton, county of Norfolk, Mass. My age is forty-two, and occupation a lawyer.

Q. 2. Are you acquainted with either of the parties to this suit?

A. I am not.

Q. 3. Are you acquainted with Alvin R. Dunton, of Boston, Mass, and, if so, how long have you known him?

A. I am. I can't tell precisely when my acquaintance first commenced with Mr. Dunton, but I have known him intimately since the spring of 1853.

Q. 4. Have you ever seen, and, if so, when first, a pencil with lead enclosed in the wood in one end and India rubber enclosed in the
495 other end, similar to defendant's exhibits E, G, FF, and GG, now shown you?

(Objected to as leading.)

A. I have. I could not say precisely when I saw them—the exact time; but I know of making a pencil like this as long ago as 1852—like these. I recognize no difference in these. There is a difference in the quality of rubber, perhaps, come to look at them; some are black, some are white rubber.

Q. 5. Was 1852 the first time you ever made a pencil of any kind having rubber and lead enclosed therein at the respective ends?

A. It was not.

Q. 6. When did you make such pencil prior to 1852, and describe it?

A. I made a pencil in 1850, constructed out of a grape-vine, by punching the pith from a grape-vine and cutting a portion of one end away, and inserting a piece of rubber and tieing it in—the rubber in, and inserting in the other end a lead.

Q. 7. Are you able to produce a specimen like that pencil, and, if so, do so?

A. I am, and I now produce it.

(Which specimen is offered in evidence by counsel for defendant, and marked Exhibit JJ, E. G. T., ex., May 13, 1873.)

Q. 8. How many such pencils like Exhibit JJ did you make and use prior to 1852?

A. Perhaps not more than three or four perfect pencils. I made a good many imperfect ones; what I mean by an imperfect one is leaving out the lead, having the rubber tied in.

Q. 9. What was your occupation at the time of your making those pencils like Exhibit JJ?

A. I was a student at the Bridgewater State Normal School, Massachusetts.

Q. 10. Describe how you made the pencil-eraser like defend-
496 ant's exhibits E, G, FF, and GG, which you have stated you first made in 1852.

A. I made the pencil by splitting the pencil and by taking out about an inch of the lead at one end of the pencil and inserting a piece of rubber and gluing the two parts of the pencil together again, tying a string around the pencil till the glue was dry.

Q. 11. What kind of pencil was it of which you so made such pencil eraser?

A. Why, it was a common wooden cedar lead pencil.

Q. 12. What time in 1852 was it that you made that first pencil-eraser?

A. It was some time during the spring or summer. I can't fix anything definite by date. I know I was teaching school at Newton, Upper Falls, at the time. I think I had made them, however, prior to that time, but I can't state definitely, as the idea had been in my mind some time.

Q. 13. Did you or not subsequently make any other pencil-erasers like Exhibits E, G, FF, and GG?

(Objected to as leading.)

A. I have made them more or less since that time down to the present time.

Q. 14. How many of them did you make between the spring of 1852 and January, 1857?

(Objected to because the witness has not stated any, within the time stated in the question, and therefore as leading.)

A. I cannot say precisely; perhaps two dozen, perhaps more, and perhaps less.

Q. 15. To what purpose, if any, did you apply them?

A. I used them in my drawing, and in lettering, and for other minor purposes, such as one would naturally use such a thing, having it.

Q. 16. How did you use them?

A. I would use the pencil to draw the outlines of a map, and the rivers and the lakes, mountains, and such things generally rep-

497 resented on a map. I would then use the fine point of the rubber to erase lines where I had made errors, and desired to make alterations, so as not to interfere with other lines made in close proximity; also to erase letters and insert letters so as not to interfere with the adjoining letters already made; also to clean the sheet or page between lines where it became soiled by the fingers or in any other way; also to clean the spaces between letters.

Q. 17. How did you obtain the fine point and exposure of the surface of the rubber and lead at the respective ends?

A. Why, simply by sharpening the ends—cutting away the wood.

Q. 18. What became of those pencil-erasers, like Exhibits E, G, FF, and GG, which you made between the spring of 1852 and January, 1857?

A. Some of them I used up; some I gave away, and many of them I lost or they were taken from me in various ways—disappeared. It is impossible for me now to account for them only in a general way.

Q. 19. Can you specify any one to whom you gave them away? if so, please do so.

A. I think I gave some to some of my pupils. I cannot now specify the names of the pupils. I recollect of giving one to a person by the name of Charles Brown, of whom I took lessons in Latin in 1854 and 1855. I took lessons of him at that time. When I was teaching school at Washington Village, Dorchester, Mass., Mr. Brown used to come to me at Washington Village; also, when I was teaching at Malden, Mass. I think I gave him the pencil when I was at Washington Village, from the spring of 1854 to the spring of 1855, during that year—from 1854 to 1855.

Q. 20. When did you cease to attend the normal school?

A. In the fall of 1850.

Q. 21. What was your next occupation?

A. Teacher at Mendon, Mass., during the winter of 1850 and 1851—three or four months.

498 Q. 22. What next?

A. The summer following I went to school again to the Milton Academy, Mass.

Q. 23. What next?

A. The next business was, I commenced teaching again at Canton, Mass., during the winter of 1851 and 1852.

Q. 24. What next?

A. I taught in the summer of 1852 at Newton, Upper Falls, from April to November.

Q. 25. What next?

A. And in the early part of the year 1853 I was engaged as assistant teacher of the Medford High School. I taught there to the spring of 1854. I next commenced teaching at Washington Village, Dorchester, in the spring of 1854 and taught to the spring of 1855. When Washington Village was annexed to Boston my school was discontinued. In the latter part of the summer of 1855 I commenced teaching at Malden and continued teaching there till the spring of 1857. I then resigned and went to Kansas; spent the spring, summer, and fall in Kansas; returned to St. Louis in December, 1857, and soon after obtained a position as teacher in St. Louis, and remained there till the spring of 1859. I then resigned and returned to Milton, Mass. I taught school in my own town for three months, as a substitute, to accommodate another teacher, who was sick. I then after that went to the Harvard Law School, Cambridge, Mass., and went through the prescribed course of studies there at the law school, and took my degree there in the spring of 1861. I am

not precisely sure about that—it was about that time; I was shortly afterwards admitted to the Boston bar. I practised law from, I think, the spring of 1862 to the fall of 1864. I then went South in the revenue service of the Government. I afterwards returned to Boston and opened an office in 1866, and have practised there since that time.

Q. 26. Have you ever seen pencil-erasers like Exhibits E, G, FF, and GG, besides those which you made yourself as you have testified?

A. I have.

499 Q. 27. When and where?

A. In 1853, in the possession of A. R. Dunton, who then occupied rooms at the corner of Washington and Summer streets, Boston, Mass. It was in the same building, I think, as Jones, Ball & Co.'s jewelry store, or their successors.

Q. 28. Where were you at the time, and how engaged?

A. I was then assistant teacher in the Medford High School.

Q. 27. What was the occasion of your seeing said Dunton, and going to his said writing-rooms?

A. I went there, with other teachers, to learn the art of teaching penmanship of him. Mr. Dunton's occupation was that of a teacher of penmanship, and the best teacher of the art that I ever knew.

(The *word* commencing with the words "and the best teacher," to the end of the answer objected to as irresponsive.)

Q. 30. How frequent and how long continued were your said visits to him?

A. They were generally once a week, and sometimes twice a week—on Wednesday and Saturday afternoons; they continued pretty much through the year 1853 to the spring of 1854, becoming less frequent towards the close of the time on my part.

Q. 31. Did you see said Dunton, during that time, have said pencil-erasers like Exhibits E, G, FF, and GG, on more than one occasion; if so, on how many of them, and how often?

A. I have seen him have them on more than one occasion; how many times I cannot say; how many pencils I cannot specify. I cannot specify how often, but quite a number of times in my visits to his headquarters.

Q. 32. What, if anything, did you see said Dunton do with said pencil-erasers?

A. He used them in making his letters, and in his pencil drawings; he used them particularly, I recollect, in shading his pencil draw-
500 ings; and I should think he made the same use of them as I did in other respects—especially in making letters and in his charts, which he always struck first with chalk or pencil. In pencil drawings, in making flowers and wreaths, and striking birds. He had a method of shading his letters by placing a piece of paper along the edge of the letters, and rubbing out some portions of the letters, and narrowing the width of the marks.

Q. 33. What were those "pencil-drawings" made on?

A. Why, made on card-board—Bristol-board.

Q. 34. For what purpose were they made?

A. For exhibition, and for ornamental purposes—to illustrate what he could do, and for other purposes which he might have in mind.

Q. 35. Was any one else than yourself present on the various occasions when you saw said Dunton have and use pencil-erasers like Exhibits E, G, FF, and GG, in 1853 and 1854, at his said writing-rooms, as you have stated; and, if so, how many, and on how many occasions?

A. There were a number of others present. I cannot state how many,

and I cannot state on how many occasions; but it was at the time that myself and others were taking lessons in penmanship. He gave lessons in penmanship at that time to all the teachers in Boston and the vicinity, who choose to avail themselves of his instructions.

And, in answer to cross-interrogatories by Mr. Wetmore, the witness says as follows:

X Q. 36. What is your age?
A. Nearly 42—42 on the 28th day of May, current.
X Q. 37. When did you last see Mr. A. R. Dunton?
A. About six weeks ago, or two months ago.
X Q. . Have you not seen him since?
A. I have not.
X Q. 39. Have you heard from him since in any way?
A. No.

X Q. 40. Have you heard from him indirectly; and, if so, how?
501 A. I have heard from him through Mr. Thacher, counselor, in Boston, I understand for the defendant.

X Q. 41. Have you heard from or of him through any written communication within the past three or four months?
A. I am not certain. I received a communication either from Mr. Dunton or Mr. Thacher, I don't know which; it seems to me from Mr. Thacher, to call at his office; I am under the impression, however, the note was from Mr. Thacher.
X Q. 42. Where was that, and when did you receive it?
A. About six weeks ago, I should think, or less; not more than six weeks ago; I received it at Milton.
X Q. 43. Have you seen Mr. Dunton since you received that communication?
A. I have not.
X Q. 44. Did you call on Mr. Thacher in response to the note?
A. I did.
X Q. 45. How soon after receiving it?
A. Within a week. I did not call immediately I remember.
X Q. 46. Did you, on that occasion, state the facts which you have testified to to-day?
A. I did to Mr. Thacher, in substance.
X Q. 47. How long before you received the note, to which you refer, had you seen Mr. Dunton?
A. I do not remember. I have been in the habit of seeing Mr. Dunton in the past year occasionally, but I have had no conversation in regard to this suit.
(The end of the answer from the words "but I have," objected to by counsel for complainant as irresponsive.)
X Q. 48. Have you read, or have you heard read, or have you had stated to you any of the testimony or the substance of the testimony already taken in this suit?
A. A very small portion of the testimony has been stated to me by the counsel for the defendant. I have not read any of the testimony; there has been none read to me.

502 X Q. 49. When did you make grape-vine exhibit JJ?
A. Since I saw Mr. Thacher.
X Q. 50. Where did you get the lead?
A. Mr. Washburn furnished me the lead.
X Q. 51. Did you make the exhibit within the last two days?
A. Completed it; I made the other portion a day or two after seeing

Mr. Thacher and carried it to him, and stated that it needed a lead to complete it.

X Q. 52. How long ago was it that you carried it to Mr. Thacher?

A. I think the second day after I called on Mr. Thacher at his request, as per his note to me at Milton.

X. Q. 53. How many times have you called on him since that note?

A. Three times, once in response to his note; the second time to carry the grape-vine; and the last time, yesterday afternoon.

X Q. 54. At whose request, if at the request of any person, did you call on him yesterday afternoon?

A. At Mr. Thacher's request himself; young Mr. Thacher came, himself, yesterday morning.

X Q. 55. On which one of these calls was it that any of the testimony was stated to you?

A. Yesterday afternoon, only. Mr. Thacher stated to me a very small portion of it.

X Q. 56. When did you first see any of the exhibits, E, G, FF, and GG?

A. I never saw them before to-day in this office.

X Q. 57. Have you ever stated to any other persons than the counsel in this suit, the facts to which you have testified; and, if so, when and who were they?

A. I never have.

X Q. 58. Are you now practising in Boston?

A. I am, but I have no office there at present.

X Q. 59. How long since you had an office there?

A. I had an office there last November, and gave up an office in Boston, on account of ill heath this winter, and have not made it a business to go to the city.

503 X Q. 60. Where was your office when you had one in Boston?

A. At 34 School street, Boston—my last office.

X Q. 61. Had Mr. Dunton his writing-rooms there at any time you had your office there?

A. He did. I think he left there in the spring, about a year ago—about the spring of 1872. I don't remember the precise time. He left some time before I did.

X Q. 62. Were you in the habit of visiting his rooms while his rooms were in the same building as your office?

A. I could not say that I was in the habit of it, but I did occasionally visit his room.

X Q. 63. Was his room on the same floor as your office in that building?

A. It was not.

X Q. 64. Did you ever visit his room in the evening at that number?

A. I remained one afternoon and evening at his room. I don't recollect of spending but one evening in his room.

X Q. 65. Was there any ladies present on that occasion?

(Objected to as immaterial.)

A. There was not.

X Q. 66. When did you see Mr. Dunton next after you took lessons from him in 1853 and 1854?

A. I don't remember now. He visited my school, however, at Washington Village, and also at Malden, and gave lessons to my pupils there; that is, gave lessons on that visit, I should say.

X Q. 67. What were the dates of those visits, as near as you can fix it?

A. It is so long ago that it is not possible for me to fix them any nearer than I have.

X Q. 68. Can you fix the season of the year?

A. I have the impression that his visit at Malden was in the fall of the year, but I cannot certainly say.

X Q. 69. That would be the fall of what year?

A. That would have been in the fall of 1855, I think; still I am not certain; it might have been in the winter of 1855 and 1856.

504 X Q. 70. When did you next see him, as far as you remember?

A. I can't specify any time, but think I saw him from time to time occasionally, from 1854 to 1856, either in Boston or at my schools. I specifically recollect of meeting him on my return from Kansas in 1859, and going to see him on some business of my own at his boarding-place in Boston.

X Q. 71. What season of the year 1859 was that?

A. Spring of the year. He was preparing then to go West, I think, and so stated to me at the time. I know I afterwards called at his place and found him gone.

X Q. 72. Do you remember about what month it was that you called and found him gone?

A. I do not. I should think it was as late as the last part of June; it might have been later. I don't recollect.

X Q. 73. Did you know any of Mr. Dunton's family, or the family of his wife, formerly Miss Laura Pendleton?

(Objected to as immaterial.)

A. I had no particular acquaintance with her. I have been introduced to her both as Miss Pendleton and Mrs. Dunton. I first saw Miss Pendleton as assistant teacher to Mr. Dunton, at his rooms, at the corner of Summer and Washington streets, Boston, Mass. I never knew any of Mrs. Dunton's family. I think I have seen some of them, however; no acquaintance with them whatever.

X Q. 74. Where did you get the lead with which you made the grape-vine pencil which you have referred to, and which you state was made by you at the Bridgewater Normal School?

A. I do not remember.

X Q. 75. Do you remember whether you purchased it or not?

A. I could not say. I presume I did.

X Q. 76. Was the lead round or square?

A. That I can't remember. My impression is I used it both round and square, taking the square leads from other pencils, as I never

505 considered this pencil like Exhibit JJ, of any great value or of great use, as I had all the advantage of use in another pencil instead of the lead thrust in a grape-vine, the great advantage being in the pointed rubber.

X Q. 77. Were the pencils which you state you used to split and pick out the lead from one end plain or colored?

A. I think they were generally plain pencils, common cedar pencils.

X Q. 78. From which end did you used to pick the lead?

A. I cannot say; I don't think I had any specific end to pick the lead from.

X Q. 79. Did the lead run all the way through?

A. I think it did; there are pencils in which they only run part way through, but I can't say I ever fixed up one in this way.

X Q. 80. Do you remember the maker or the stamp on any of the pencils you treated in this way as you state?

A. I do not.

X Q. 81. Where is Charles Brown, who taught you Latin?

A. I do not know. I could find him easily if living; his family did belong to the same town that I do.

X Q. 82. When did you last see or hear of him?

A. I do not remember. I think he was living in Boston in 1859.

X Q. 83. What was his business?

A. He was a private teacher at that time, giving lessons in Latin and French to any one who would employ him.

X Q. 84. When did you next see Mr. Dunton after you saw him on your return from Kansas?

A. I never saw him till he took a room at 34 School street, Boston, which was in 1870, I think; the summer of 1870, I think, or 1871.

X Q. 85. What position did you hold in the revenue service when you went South?

A. Clerk of the collector of the port of Fernandina, Florida.

506 X Q. 86. Who was librarian at the law school when you were there in 1860?

A. I think a man by the name of Dickenson was a portion of the time; there was another man, I think; I don't remember his name.

X Q. 87. Do you remember any of the names of the class who graduated at the law-school?

A. Yes, I do; Charles W. Jacobs, E. W. Morton, Mr. J. G. Stetson, clerk of the United States court, now of Boston, and a great many other names I can mention if desired.

JAMES SUMNER.

Subscribed and sworn to the 13th day of May, 1872.

E. G. THOMPSON,
Examiner.

It is consented that the name of the witness just examined be included in the amended answer, counsel for plaintiff reserving the right of further cross-examination.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Depositions of witnesses on behalf of the defendant in the above-entitled cause, taken before me, Wm. B. Dayton, a special examiner in said court, at my office, No. 522 Walnut street, in the city of Philadelphia, on Friday, the 25th day of April, A. D. 1873.

507 FRIDAY, *April* 25, 2 p. m.

Present, John S. Washburn, esq., for defendant; Edmund Wetmore, esq., on behalf of complainants.

HYMEN L. LIPMAN, a witness produced on behalf of defendant, being by me first duly and solemnly sworn, deposes and says:

1. Q. Please state your name, age, residence, and occupation.

Ans. My name is Hymen L. Lipman; am fifty-six years of age. I reside at No. 136 North 10th street, in the city of Philadelphia; am a stationer; doing business at No. 32 South 4th street, in said city.

2. Q. Are you acquainted with the parties, or either of them, in this suit; and if so, how long have known them?

Ans. I am acquainted with both; have known each of them for many years.

3. Q. Have you any business connection or relations with the complainant, or with the Eagle Pencil Company, of which he is a partner; and if so, what?

Ans. I purchase and sell goods of their make; am an ordinary customer.

4. Q. Have you ever seen a pencil having lead in one end and India rubber in the other end, inclosed in a conical or bulging sheath of greater diameter at the end than the diameter of the rest of the pencil; and if so, when did you first see such an article?

Ans. The first one I have ever seen is the one now produced by me. (Which is marked by the examiner "Defendant's Exhibit GG.") I can't say exactly when I first saw this; it must have been previous to August, 1862.

508 5. Q. Where did you then see it?

Ans. At my then place of business, which was at No. 239 Market street, in the city of Philadelphia.

6. Q. In whose possession did you then see it?

Ans. I had given directions to my manufacturer, Mr. Joseph T. Mears, to make a pencil to accommodate a thicker rubber than we had been using; and among two or three different specimens this style was shown me.

7. Q. Did you tell Mr. Mears how to make this pencil; and if so, what did you say?

Ans. I cannot, at this distance of time, remember.

7. Q. Did you, or said Mears, devise this kind of pencil-eraser?

Ans. I devised it.

9. Q. And he simply made it for you, by your direction, according to your said device?

Ans. That's so.

10. Q. Where has that pencil-eraser, Exhibit GG, been ever since, and until now produced by you?

Ans. In my possession.

11. Q. Have you ever claimed to be the inventor of this pencil eraser and this device?

Ans. I may have considered myself so, but not made such a claim, for at the time I did not attach any value to it.

12. Q. Have you ever made an assignment of this pencil and device to any one; and if so, to whom?

Ans. I have; to Mr. Levi L. Tower.

(Mr. Washburn here offers the Exhibit GG in evidence in this cause.)

13. Q. Please look at the paper now shown you, and state if this is the original assignment of this pencil-eraser and device referred to in your last answer?

Ans. It is.

14. Q. In whose handwriting is this assignment, and who drew the figure of the said pencil at the top, marked "A," and referred to in it?

509 Ans. In my own handwriting; and I also drew the said figure marked "A," at the head of the assignment.

15. Q. Was the letter A, which appears upon the Exhibit GG in two places, put there by you at the time of said assignment to identify the Exhibit GG as the pencil referred to in the assignment, and by the drawing at the top of the assignment?

Ans. Yes, sir.

(Mr. Washburn offers in evidence the assignment referred to, which is marked by the examiner "Defendant's Exhibit HH.")

16. Q. Who sharpened Exhibit GG at the lead end?

Ans. I suppose I did, but I can't remember.

17. Q. When?

Ans. I can't remember.

18. Q. Did you show or describe it to any one; and if so, to whom?

Ans. I think one or two persons may have seen it. I think I may have shown it to the one or two persons—Mr. E. W. Lehman and Mr. J. P. Charlton. Mr. Tower of course saw it, and also Mr. Mears. I believe that is about all who did see it.

20. Q. When with reference to the time this pencil was first devised and made, did you show it to Mr. Lehman and Mr. Charlton, and when did Mr. Mears see it?

Ans. Mr. Mears first saw it, because he made it; I can't remember exactly when I first showed it to Mr. Lehman or Mr. Charlton, but it was about that time; that is, within a week or two after it was first devised; it may have been within a day or two.

21. Q. Did you, or they, or any them, use or try the lead and rubber ends of said pencil at the time, to see how it would work?

Ans. I tried it.

22. Q. Did they, or either of them, do so?

Ans. I don't think they did.

23. Q. How did you try it?

510 Ans. By writing with the lead on the paper and erasing with the rubber.

24. Q. Did you ever make any other of these pencils and erasers like Exhibit GG?

Ans. No sir.

25. Q. Did Mr. Mears ever make any others of that kind?

Ans. My impression is that two or three specimens were shown by Mr. Mears to me at the same time, and this was considered the best. I have an indistinct recollection that there was one in which the bulging top was screwed on.

26. Q. Were all those specimens like Exhibit GG, so far as having lead in one end and rubber in a similar conical or bulging sheath at the other end.

Ans. Yes, sir.

27. Q. Where are those other specimens?

Ans. I think what I didn't approve I destroyed.

28. Q. When did you destroy them?

Ans. Shortly after.

29. Q. Do you distinctly remember destroying them?

Ans. Not distinctly.

30. Q. Will you swear that in fact they were destroyed by you or by any one?

Ans. During the progress of these experiments it was my custom to put aside or destroy, merely keeping the best.

31. Q. 30 repeated.

Ans. I can't state definitely, because there is a doubt whether there was more than one of that shape, as mentioned in my previous answer, having only an impression of another.

32. Q. 29 repeated.

(Mr. Wetmore objects to the question on the ground that an answer has been substantially given in the last answer.)

Ans. If it, the other, existed, I must have destroyed it; it is so far back that I can't swear to it.

511 Cross-examined by Mr. Wetmore:

33 X Q. You are the patentee of the Lipman patent of 1858 for a combined pencil and eraser, now extended?

(Objected to by defendant's counsel as being new matter, not called out or referred to in the examination-in-chief.)

Ans. I am.

34 X Q. Did you make Exhibit G G as an experiment?

(Objected to by counsel for defendant as leading, and as directing the witness' mind to a conclusion desired in the interests of the complainant.)

Ans. It was among the experiments I made.

35 X Q. Did you prosecute or abandon it?

(Same objection as to last question.)

Ans. I did not approve of it, and therefore abandoned it—that style.

36 X Q. Where were you doing business before you engaged at No. 239 Market street?

Ans. I was previously at No. 32 South Fourth street.

37 X Q. When did you move to Market street from 32 South Fourth street?

Ans. About the 1st of March, 1861.

(Counsel for complainant reads to witness the last sentence of Exhibit H H, beginning with the words "among the original experiments," and adds)—

38 X Q. Is the statement made in the sentence just read to you correct?

Ans. I am sorry to say that in drawing this paper a mistake has been made in stating that among the original experiments was this sample, as it really was made subsequently, when experimenting to enlarge the rubber.

39 X Q. Please explain under what circumstances the paper was executed and how the other arose.

512 Ans. Only last night I discovered that there was this great error, and can only account for it by saying that at the time this assignment was made it was hurriedly drawn, towards evening, and as the subject-matter had occurred so many years back at that time, and until it struck me last night had appeared to me to refer to one continued series of experiments, whereas, in matter of fact, the experiments for the enlarged top were not made until some time after.

40 X Q. Please state any facts that you remember that now enables you to fix the date of the manufacture of Exhibit G G as subsequent to your removal to Market street?

Ans. It was after the war had commenced that I moved. My experiments for the enlarged rubber commenced after I moved to Market street, which was about the 1st of March, 1861, and the first delivery of enlarged rubber-heads was made in August, 1862, previous to which the head like G G had been abandoned, and the head with a ring was substituted, a sample of which I now produce, and which I will explain: The ring allowed of a large rubber being used, even when the pencil was of the ordinary thickness, strengthening the wood and protecting the rubber when not in use, which I thought offered superior advantage to the Exhibit G G.

(Complainant's counsel here offers and puts in evidence the pencil produced by witness, which is marked by the examiner "Complainant's Lipman A.")

41 X Q. How long, to the best of your recollection, before the ring-

pencils like Exhibit Lipman A, just produced, were made, was Exhibit G G made?

Ans. As near as I can judge, within three or four months of August, 1862, was the time when the ring-pencils were made, and Exhibit G G was made three or four months—it might have been only two months—before that.

42 X Q. Did you move to Market street after the war actually commenced?

513 Ans. I have stated that I moved there about the 1st of March, 1861.

43 X Q. How is the head of G G, containing the rubber, united to the sheath containing the lead?

Ans. It is glued on.

44 X Q. Are you a German by birth or descent?

Ans. My father was an Englishman. I am of German descent; was born in the West Indies. My mother was not a German.

Re-examination by Mr. Washburn:

45 X Q. Have you received any communications in reference to this examination or your being a witness in this case from Isaac Hirsch, the agent and representative of the complainant, now present, or from any one else, on behalf of or representing the complainant or his firm, the Eagle Pencil Company?

Ans. I have.

46 Q. By letter or otherwise, and how?

Ans. After Mr. Tower was here, early in April, 1873, I was in New York, and explained to Mr. Hirsch that I had made an assignment or agreement with Mr. Tower, as he had never known this before from me; and, thinking it might have a bearing on the points in dispute, it was agreed that he (Mr. Hirsch) would come on in case I should be wanted for examination.

47 Q. Have you since received any letter or letters from Mr. Hirsch in reference to this examination of yourself and your testimony in this case?

Ans. I have.

48 Q. How many?

Ans. I have had letters on other matters of business, and advised him to let me know when the examination would take place.

49 Q. X Q. 48 repeated.

Ans. Maybe two or three.

50 Q. When did you receive these?

Ans. I got two telegrams yesterday, and one previously, and a letter, all within a week or ten days last past.

514 51 Q. You have spoken of Mr. Tower having been here the early part of this present April. Was that the time you made the assignment to him, Exhibit H H?

Ans. No, sir.

52 Q. Was that assignment made at the time it bears date, to wit, September 7th, 1870?

(Objected to as not relating to the subject-matter of cross-examination.)

Ans. It was.

53 Q. Did you yourself draw that paper, Exhibit H H, wholly?

(Same objection.)

Ans. Yes, sir.

54 Q. Did any one dictate or advise you what to state in it?

Ans. No, sir.

It is here agreed and stipulated between counsel for the respective parties that a transcript of Exhibit H H, duly certified by the examiner, may be substituted in his return for the original, the original assignment being retained by counsel for defendant, the same to be produced during the further examinations in this cause, or on the trial, if required.

Also, that they will consent to the withdrawal of Exhibit G G, upon the final termination of this suit, including any appeal.

HYMEN L. LIPMAN.

Sworn to and subscribed before me this 25th day of April, A. D. 1873.

WM. B. DAYTON,
Special Examiner.

EXHIBIT H H.

I, Hymen L. Lipman, of the city of Philadelphia, State of
515 Pennsylvania, stationer and manufacturer of lead-pencils, &c., did invent and obtain letters-patent for a lead pencil and rubber combined, bearing date March 30, 1858, and numbered 19783, and have since manufactured and sold pencils made under said patent. Among the original experiments and samples made prior to adoption of style was one like that at the head of this sheet, having a conical top to allow for the enlarged rubber at end, made before any of my pencils under said patent were offered in the market, and of which one is still in my possession, marked A, which was made at same time as or previous to my application for said letters-patent.

Signed at Philadelphia, September 7th, 1870.

HYMEN L. LIPMAN. [L. S.]

Witness:
JOHN A. BERWIND.

I hereby transfer to Levi L. Tower, his heirs or assigns, all my right, title, and interest in above conical-tip pencil.

HYMEN L. LIPMAN. [L. S.]

[Stamped 5c.]
Witness:
JOHN A. BERWIND.

In consideration of above transfer, I hereby agree to pay said H. L. Lipman, his heirs or assigns, one-half of nett proceeds of said invention —said H. L. Lipman to be at no expense in relation thereto.

Dated Philadelphia, September 7th, 1870.

LEVI L. TOWER. [L. S.]

Witness:
JOHN A. BERWIND.

JOHN P. CHARLTON, being produced for examination on behalf of defendant, and by me first duly sworn, deposes and says:

1 Q. Please state your name, age, residence, and occupation.

Ans. My name is John P. Charlton; am forty years of age; I
516 reside at the southeast corner of Seventh and Catharine streets, Philadelphia; am in the employ of Mr. H. L. Lipman, stationer.

2 Q. Are you acquainted with either of the parties to this suit; and, if so, how long have you known them?

Ans. I am not acquainted personally with either of them.

3 Q. Please look at defendant's Exhibit G G, now shown you, and state whether you have ever seen it before; and, if so, when first.

Ans. I have seen this pencil. It was shown to me by Mr. Lipman at his store in Market street, in, I think, 1862; the month I can't specify.

4 Q. What part of the year 1862 was it?

Ans. I can't state exactly, but I think it was somewhere about March or April.

5 Q. Did you see Mr. Lipman then use it when he showed it to you?

Ans. No, sir.

JOHN P. CHARLTON.

Sworn to and subscribed before me this 25th day of April, A. D. 1873.

WM. B. DAYTON,
Special Examiner.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, City and County of Philadelphia, ss:

Be it remembered that before me, William B. Dayton, a duly-
517 appointed special examiner in the above-entitled cause, at the time and place hereinbefore noted, appeared the said parties, by their respective counsel, when and where were offered and put in evidence the several exhibits hereinbefore referred to, and which have been by me duly marked in said cause, and the defendant produced for examination on his behalf the witnesses aforementioned, whose depositions were by me taken and reduced to writing in the presence of the said witnesses, respectively, and by them respectively subscribed in my presence, they having first been severally sworn according to law to testify the truth, the whole truth, and nothing but the truth, in this cause aforesaid.

Witness my hand at said city of Philadelphia, this 29th day of April, A. D. 1873.

WM. B. DAYTON,
Special Examiner.

U. S. circuit court, southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Proofs on the part of the defendant in the above-entitled cause, taken before Edward G. Thompson, one of the examiners of this court, under and pursuant to the 67th rule in equity, as amended.

NEW YORK, *May 7th*, 1873—2 p. m.

Present, counsel for both parties.

A. FABER DU FAUR, being produced as a witness on the part of the defendant, being first duly sworn, in answer to interrogatories propounded by Mr. Washburn, deposes and says:

518 1 Q. What is your name, age, residence, and occupation?

A. A. Faber du Faur; I am 47 years of age; I reside at Newark, New Jersey; I am an engineer and metallurgist.

2 Q. Please state your acquaintance and experience in the theory and practice in the mechanic arts and as an expert in patent-cases, if you have ever been such.

A. I have been educated as an engineer and metallurgist, at the Polytechnic School at Switzerland, Germany. I successfully graduated, and was employed in the government service, at Wurtemburg, three years. I graduated in 1845 and 1847; and for three years after the latter date was employed at Wurtemburg as assistant superintendent of government iron-works. I came to this country, on leave of absence, in 1861, and have practised my profession in this country since that time. During the last five years I have been engaged as expert in a considerable number of patent-causes.

3 Q. Please look at complainant's Exhibits No. 5 and No. 6, now placed in your hands, and state if you have read the same and are acquainted with the specifications and claims, and with what is shown and described therein, of the said patents.

Ans. I have examined the patents, Exhibits 5 and 6, and I believe I understand the inventions described and claimed therein.

4 Q. Please state what, in your opinion as an expert, are described and shown in the specifications and claims of the said patents Exhibits Nos. 5 and 6.

A. I find in Exhibit 5, described and shown, the aggregation of two tools or instruments in a common handle, viz, of a lead-pencil and an India rubber. I call it an aggregation, because there is no reciprocal action or operation of the two instrumentalities, and because the action of neither of them is modified by being united in a common handle. The method shown and described, of uniting the two instruments, is to make a pencil in the usual manner, inserting lead for only about three-

519 fourths of the length and India rubber for the remaining one-fourth of the length, the India rubber being inserted into an enlarged groove. After the lead and rubber have been inserted the pencil is finished in the usual manner, by which I understand that the two parts or halves are glued together, and any additional finish given, if desired. The lead and rubber are exposed for use by cutting in the usual manner. This is the only method which I find described of uniting the two instruments in a common handle. In Exhibit 6 I find substantially the same invention as the one shown and described in Exhibit 5, with a change of relative proportions and of form. The rubber in Exhibit 6 is thicker in proportion than the rubber in Exhibit 5, and the sheath is enlarged at the rubber-end so as to have strength enough to hold the thicker rubber. This enlargement of one end of the sheath forms one part of the invention; the other part consists in gradually tapering the wooden case from the enlarged and recessed head toward the opposite end. The method of uniting the two instruments, as shown and described in Exhibit 6, consists in having a wooden casing made in two parts, larger at one end than at the other, the two parts to be glued together in the ordinary manner. The casing has a small groove for the reception of the lead, and the larger groove for the reception of the rubber or similar article.

5 Q. Please examine the lead-pencil now shown and handed to you, with rubber-erasers, being complainant's Exhibits Nos. 2, 3, and 4, and state your opinion, as an expert, in regard to the identity of these articles with what is described and shown in the claims and specifications of complainant's patents, Exhibits Nos. 5 and 6.

A. I have examined complainant's Exhibits 2, 3, and 4, and I find the same substantially different from what is shown and described in the specifications and claims of Exhibits 5 and 6.

6 Q. Please state your reasons for such opinion.

A. In Exhibits 2, 3, and 4 the aggregation of the rubber and lead-pencil is accomplished in a manner entirely different from the manner described and shown in Exhibits 5 and 6, and the result produced
520 is also different, while in Exhibits 5 and 6 large and small grooves are made in the wooden sheath for the reception of both lead and rubber. In Exhibits 2, 3, and 4 there is no groove in the wooden sheath for the reception of the rubber; the rubber is inserted into a paper tube, and the rubber and pencil are united by inserting the end of the pencil into one end of the paper tube. It is evident that the pencil must be finished, that is, the halves glued together, before the paper tube and rubber can be attached. The paper tube enclosing the rubber has no longitudinal closed joints like the wooden sheath in Exhibits 5 and 6; it is not subject to splitting, and forms a much stronger article. Exhibits 3 and 4 are tapering, but neither of them has one end of the wooden sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article; on the contrary, the tapering wooden sheath contains only the ordinary lead, and does not form a receptacle for an eraser. The wooden case of complainant's Exhibits 3 and 4 does not have an enlarged and recessed head, such as described in Exhibit 6. I quote from Exhibit 6. "The remainder, at the larger end, has a much larger groove or recess, in which the India rubber C, or other similar article to be therein held, is placed as represented." No such recess is found at the large end of the wood casing of Exhibits 3 and 4.

Examination adjourned to May 8, 1873, at 11 a. m.

RECKENDORFER
vs.
FABER.

NEW YORK, *May* 8, 1873—11 a. m.

Met pursuant to adjournment.

Present, counsel for both parties.

Examination of Mr. Du Faur continued:

521 7 Q. Have you read the testimony of Edward S. Renwick and Henry B. Renwick, the complainant's experts in this suit?

A. I have.

8 Q. Do you agree or disagree with their opinions therein expressed, and particularly in relation to the identity of complainant's Exhibits 2, 3, and 4 with the article described and referred to in the specifications and claims of complainant's Exhibits No. 5 and No. 6?

A. I do not agree with their opinions, particularly not as to the identity of Exhibits 2, 3, and 4 with what is described and claimed in Exhibits 5 and 6.

9 Q. Please state your reasons for such disagreement.

A. In Exhibit 5 I find the following disclaimer: "I do not claim the use of a lead-pencil with a piece of India rubber or other erasive material attached at one end, for the purpose of erasing marks." Exhibits 2, 3, and 4 have India rubber attached at one end of a lead-pencil for the purpose of erasing marks, but the method by which the rubber in attached is strictly different from the method shown and described in Exhibits 5 and 6, as I have fully explained in my former answers. I do not consider the paper tube attached to a pencil finished in the usual

manner as the mechanical equivalent of a wooden sheath, into which both lead and rubber are inserted, because the character of the two devices and the method of producing the same is different, and because the result produced is entirely different from the result produced by what is shown in Exhibits 5 and 6. A paper tube gives much more strength at smaller dimensions than a wooden sheath with longitudinal joints. The paper tube with the rubber inserted, and the lead-pencil finished in the usual manner, represent two distinct instruments, with handles, which are only united by inserting the one into the other.

10 Q. The said experts express the opinion of the identity of said Exhibits 2, 3, and 4 with what is shown and described in 5 and 6, for the reason that all the said pencils can be cut with a knife, so as to expose fresh portions of the rubber when necessary. Please state your opinion, as an expert, in regard thereto.

522 (Complainant's counsel objects, for the reason that the question does not accurately state the result of the said expert's testimony, and so assumes what has not occurred.)

A. In Exhibits 2, 3, and 4, as well as in what is shown and described in Exhibits 5 and 6, the lead and rubber are exposed by cutting away one or the other end of the handle, but I do not for this reason consider the two devices as mechanical equivalents, because they cannot be mutually exchanged without materially altering the method of uniting the two instruments and the result produced, and because I am under the impression that India rubber inclosed in wooden sheath in such a manner that fresh portions of the rubber could be exposed by cutting away the wood had been known in the arts prior to the inventions Exhibits 5 and 6.

11 Q. Please look at defendant's Exhibit A, and state whether, in your opinion, the same corresponds with or differs from what is shown and described in Exhibits No. 5 and No. 6, and in what respects, and your reasons.

A. Exhibit A corresponds with what is shown and described in Exhibits 5 and 6, inasmuch as in Exhibit A, as well as in Exhibits 5 and 6, there is India rubber attached to one end of the pencil. Exhibit A differs from what is shown and described in Exhibits 5 and 6 in the method of attaching the rubber and in the result produced, the rubber not being inserted in the wooden sheath of the pencil, as in Exhibits 5 and 6, it being inserted into a metallic tube and attached to a pencil finished in the usual manner by inserting the pencil into the end of the tube. The tube cannot be cut so as to expose fresh surfaces of the rubber, and for this purpose the rubber will either have to be pulled out of the tube or pushed out by forcing in the pencil. The handle for the rubber is much stronger than the handle or sheath in Exhibit' 5 and 6. Exhibit A does not show a tapering sheath, as shown and described in Exhibit 6.

523 12 Q. How does defendant's said Exhibit A, in your opinion, correspond with or differ from complainant's Exhibits 2, 3, and 4, and in what respects?

A. In Exhibit A, as well as in Exhibit' 2, 3, and 4, rubber inserted into a tube is attached to a lead-pencil by inserting one end of the pencil into one end of the tube, and so far the methods employed for uniting the two instruments are the same, but the material of Exhibit A for holding the rubber being metal prevents the exposing of fresh surfaces of rubber by the cutting of the tube, and in this respect the two devices differ. Exhibit A, also, does not show a tapering pencil as Exhibits 3 and 4.

13 Q. Please look at defendant's Exhibits D, H, and K, and state if you would make the same answers to the same preceding questions with reference to these exhibits as with reference to defendant's Exhibit A?

(Objected to as leading.)

A. I would in respect to Exhibits H and K, where, however, a "style" is substituted for a lead-pencil. In Exhibit D I find a holder, into one end of which rubber is inserted and crayon in the other, but I do not find an ordinary lead-pencil in Exhibit D. In Exhibit H the handle of the style is tapered part of its length toward the end where the India rubber is inserted into a narrow tube.

14 Q. Have you read the application, and seen the drawing, and read the specifications annexed thereto, of Joshua Gray, filed Sept. 18th, 1856, for "improvement in pencils, pencil-cases, or holders?" And are you acquainted with what is shown and described therein?

A. I have read and examined the specification and drawing referred to, and I believe I understand what is 'hown and described therein.

15 Q. Please look at defendant's Exhibit R, being the said specification and drawing of said application, and state whether what is therein shown and described corresponds with or differs from what is shown and described in the specifications and claims of the patents complainant's Exhibits Nos. 5 and 6, and also from complainant's Exhibits Nos. 2, 3, and 4, and in what respects.

524 A. In Exhibit R I find India rubber attached to one end of a lead-pencil. The method employed for attaching the rubber is different from the method shown and described in Exhibits 5 and 6, and also different from the method employed in Exhibits 2, 3, and 4, although it resembles this method to a certain extent; as in Exhibit R, as well as in Exhibits 2, 3, and 4, the rubber is placed in one end of a hollow holder, into the other end of which the end of the pencil is inserted.

16 Q. Please look at defendant's Exhibit S, and also defendant's Exhibit Z, and state how the said pencils correspond with or differ from what is shown and described in complainant's Exhibits Nos. 5 and 6?

A. I find in Exhibit S and Z erasive material enclosed in a wooden sheath in the manner usual for lead-pencils, the sheath being made in halves, glued together after the insertion of the erasive material. Fresh portions of the erasive material can be exposed by cutting away the wood. The handle used for holding the erasive material is substantially the same as the handle for the erasive material in Exhibits 5 and 6, but there is no lead-pencil inserted into this handle as in Exhibits 5 and 6; it also is not tapering as Exhibit 6.

17 Q. Please look at defendant's Exhibit T, and answer the same question as respects this exhibit.

A. Exhibit T is substantially the same as Exhibits S and Z, except that it appears the erasive material at the two ends are different. I have cut each end of the exhibit for the purpose of ascertaining this; one end is marked "pencil-eraser" and the other end is marked "ink-eraser." I find that the material at one end feels rougher than the other.

18. Q. Please look at the defendant's Exhibit C C, and state how that corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6.

A. Exhibit C C is substantially what is shown and described in Exhibit 5. It differs from Exhibit 6 in the sheath not being enlarged at the rubber end, and in not being tapering.

525 19 Q. Please look at defendant's Exhibit U, and state whether

that corresponds with or differs from what is shown and described in complainant's exhibit No. 6, and in what respect?

A. Exhibit U corresponds with what is shown and described in Exhibit 6, inasmuch as it is a pencil, composed of a wooden sheath, having one end of the sheath enlarged; but it differs from Exhibit 6 in not having that enlarged end recessed to constitute a receptacle for an eraser or other similar article. The enlarged end of the sheath in Exhibit U is inserted into an open metal tube forming a receptacle for a pen. The sheath in Exhibit U gradually tapers from its enlarged head towards its opposite end, as in Exhibit 6, but *but* not from an enlarged and recessed head.

20 Q. Please look at defendant's Exhibit E, and state whether, in your opinion, that corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respect?

A. Exhibit E is substantially the same as shown and described in complainant's Exhibits 5 and 6, except that one part of the sheath is cut across, and that it is not tapering, as Exhibit 6.

21 Q. Please look at defendant's Exhibit G, and state whether, in your opinion, that corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respect?

A. Exhibit G is substantially what is shown and described in Exhibits 5 and 6, with the exception of the wooden sheath not being enlarged and tapering, as in Exhibit 6.

22 Q. Please look at defendant's Exhibit I, and state whether, in your opinion, that corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respect?

A. Exhibit I is similar to what is shown and described in Exhibit 5. It has a "style" inserted instead of black lead, and it does not appear
526 that the handle or sheath is made in two halves, in the manner pencils are usually made. In addition to this, it differs from Exhibit 6 in not having the rubber-end enlarged and the handle tapering. It is similar to Exhibit 6, inasmuch as it is similar to Exhibit 5, as stated above.

23 Q. Please look at defendant's Exhibit D D, and state whether, in your opinion, it corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respect?

A. Exhibit D D has rubber at one end of a wooden handle, and hard lead, or what appears to be hard lead, in the other end. The wooden handle is covered with paper, and I am not able to see whether the pencil has been finished in the usual manner or not; but it appears that the rubber was inserted between the two halves of the sheath, and this part is strengthened by a string being tied around the end. I have cut the lead-end slightly for the purpose of examining the material.

24 Q. Please look at defendant's Exhibit E E, and state whether, in your opinion, it corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respects.

A. Exhibit E E is substantially what is shown and described in Exhibits 5 and 6, with the exception that crayon is substituted for black lead. It further differs from Exhibit 6 in not having the rubber-end enlarged, and in not tapering towards the other end.

25 Q. Please look at defendant's Exhibit F F, and state whether, in your opinion, it corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respects.

A. Exhibit F F is what is shown and described in Exhibits 5 and 6. It differs from Exhibit 6 in the sheath not being enlarged at the rubber-

end and in not tapering. I have cut the lead-end slightly to examine it.

26 Q. Please look at defendant's Exhibit G G, and state whether, in your opinion, it corresponds with or differs from what is shown and described in complainant's Exhibits 5 and 6, and in what respects.

A. Exhibit G G is what is shown and described in Exhibits
527 5 and 6. It differs from Exhibit 6 in the sheath not being enlarged at the rubber-end and in not tapering.

27 Q. Have you read and are you acquainted with the letters-patent granted to Philip Hufeland, dated February 18th, 1873, No. 136122, for "improvements in lead-pencils," of which certified copy, being defendant's Exhibit X, is now shown you?

A. I have read and examined the letters-patent Exhibit X, and I believe I understand the invention described therein.

28 Q. Please state whether, in your opinion as an expert, complainant's Exhibits 2, 3, and 4 correspond with or differ from what is shown and described in the specification and claim of said patent, and state in what respects.

A. I find Exhibits 2, 3, and 4 to be the same as what is shown and described in Exhibit X. Exhibit X does not specifically mention tapering pencils, such as in Exhibits 3 and 4, but I do not find that the specification restricts the invention to any particular form of lead-pencil.

29 Q. Please look at "Defendant's Exhibit G G^2, Wm. B. Dayton, special examiner," and state whether, in your opinion as an expert, the same corresponds with or differs from what is shown and described in the specification and claim of the patent, complainant's Exhibit No. 6, and state in what respects?

A. I find in Exhibit G G^2 a lead-pencil with a wooden sheath having at one end an enlarged and recessed wooden sheath, forming a receptacle for an eraser, and so far it is similar to what is shown and described in Exhibit 6, the enlarged sheath also tapering part of the distance towards the other end. It differs from what is shown and described in Exhibit 6, inasmuch as it appears that the enlarged sheath and the sheath for the pencil are made separate, the end of the sheath of the pencil being inserted into the sheath for the rubber. The sheath
528 for the rubber, as well as the pencil, appear to be made in two parts, glued together in the manner in which pencils are usually made.

A. FABER DU FAUR.

Subscribed and sworn to this 8th day of May, 1873.

E. G. THOMPSON,
Examiner.

529 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
v.
EBERHARD FABER. } In equity.

The deposition of Martin V. Tower, taken on behalf of defendant, at Camden, Maine, Sept. 3d, 1873, before Fred'c Dodge, special examiner

Direct interrogatories by John S. Washington, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Martin V. Tower; Lincolnville Beach; shoe manufacturer.

Int. 2. Are you acquainted with either of the parties to this suit?

Ans. No, sir; I am not.

Int. 3. Are you acquainted with A. R. Dunton, writing-master? If so, how long have you known him?

Ans. I am. I have known him since 1855—1855 was the first time I saw him, to be acquainted with him.

Int. 4. Where did you see him in 1855?

Ans. At Lincolnville Centre, Maine.

(Complainant objects to testimony as to Mr. Dunton's presence in this vicinity in 1855, as not rebuttal of new matter introduced by plaintiff in his defensive evidence, but as merely cumulative of the evidence introduced by defense in the first instance, and as immaterial and irrelevant.)

Int. 5. What time in the year 1855 did you see said A. R. Dunton, at said Lincolnville Centre?

(Same objection.)

530 Ans. In the fall. I don't recollect the date exactly, but I think it was in November.

Int. 6. State the circumstances under which you so saw him then and there.

(Same objection.)

Ans. I was at work, shoemaking, with my father, Martin W. Tower, and I heard him speak of Mr. Dunton a steaching him penmanship and drawing, very often, and he went across to the tavern to see him. I took a notion I'd go, too, I'd heard him speak so much of him. Father was talking with him. I asked him if that was the man, and he said it was. He said that he had his wife with him—married a few weeks since.

Int. 7. Where were you then residing?

(Same objection.)

Ans. At Lincolnville Centre.

Int. 8. Have you since seen and been personally acquainted with A. R. Dunton?

(Same objection.)

Ans. I have not till recently. I have recently.

Int. 9. Do you recognize said A. R. Dunton, whom you are now acquainted with, as the same person whom you so saw at said Lincolnville Centre in 1855?

(Same objection.)

Ans. I do.

Int. 10. How do you fix the fall of 1855 as the time when you so saw said Dunton at Lincolnville Centre?

(Same objection.)

Ans. I was at work for John C. Tower, at journey-work; and in 1856 father went to Rockland to work; and in 1857 I went West with him, in April.

Cross-interrogatories proposed de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

531 (Complainant's counsel give notice that they shall move to strike out the testimony of this witness, and all testimony to the same effect, for the reasons stated in the 4th direct interrogatory.)

Cr.-int. 1. How recently have you seen A. R. Dunton?

Ans. A week ago last Friday, I think it was, he called at my shop.

Cr.-int. 2. Did he call for the purpose of getting you to testify in this case?

Ans. Father was with him; they had been to Lincolnville Centre, and, as they came home round that way, they called in to see me.

Cr.-int. 3. What was the object of his call, if you know?

Ans. All the object he made was, he asked me if I saw him in Lincolnville in 1855.

Cr.-int. 4. Did either your father or Mr. Dunton recall the circumstance of you seeing him at that time?

Ans. Mr. Dunton asked me if I saw him at that time.

Cr.-int. 5. Did either your father or Mr. Dunton suggest to you the fact of your going over to the hotel to see him?

Ans. They did not.

Cr.-int. 6. When had you seen Mr. Dunton last before he called on you with your father?

Ans. No recollection of seeing him at all since 1855.

Cr.-int. 7. How long had you resided at Lincolnville Centre prior to 1855?

Ans. All my life-time.

Cr.-int. 8. How long did you continue to reside there after 1855?

Ans. Until the spring of 1857; I worked away from home some.

Cr.-int. 9. During what period did you work at journey-work, as you have testified? When did you begin and when did you cease?

Ans. I commenced August 1st, 1855, and worked till school commenced—I don't remember the date now. When school commenced I went to school.

532 Cr.-int. 10. Did you work at your trade prior to 1855? and, if so, where and how?

Ans. I did, with my father, at Lincolnville Centre; worked for him same as any boy works for their father.

Cr.-int. 11. In what different way, if any, as to journey-work or otherwise, did you work with your father prior to August 1, 1855, from what you did after August 1, 1855?

Ans. I worked with him at journey-work, and he carried on the shop himself. By journey-work I mean piece-work—custom-work.

Cr.-int. 12. Did your father have a shop of his own prior to August 1, 1855?

Ans. Hired a shop.

Cr.-int. 13. Did your father give up that shop on August 1, 1855?

Ans. He didn't hire the shop then, he worked at journey-work with his brother.

Cr.-int. 14. Did you work at the same shop with him?

Ans. I did.

Cr.-int. 15. How long did you continue to work at journey-work with John C. Tower?

Ans. Until winter school commenced. Don't remember as to date.

Cr.-int. 16. What month did winter school commence, according to your best recollection.?

Ans. I think it was December 1st. I won't say positive.

Cr.-int. 16. When your father was working at Rockland did he visit Lincolnville Centre?

Ans. Not till after he was through work, not that I recollect of.

Cr.-int. 18. When did he cease work at Rockland?

Ans. I don't remember. To the best of my recollection he came home some time in the winter before school was done. I think some time in January—January, 1856—before school was over.

Cr.-int. 19. Then did your father remain at home until you went West with him in January, 1857?

Ans. He remained at home—at Lincolnville Centre.

533 Cr.-int. 20. What were you doing during the summer and fall of 1856?

Ans. Well, I worked in the hay-field through haying; after that I jobbed round at different kinds of work.

Cr.-int. 21. Did you do any shoemaking?

Ans. Very little.

Cr.-int. 22. Where was John C. Tower during the summer and fall of 1856?

Ans. He was at Lincolnville Centre.

Cr.-int. 23. Was he engaged in the shoemaking business there at that time?

Ans. He was.

Cr.-int. 24. In the same shop in which you worked in 1855?

Ans. No, sir; I think not. I won't be positive. He went to another shop soon after, in the fall, if he didn't then. He was in another shop in the spring of 1857.

Cr.-int. 25. Were both the shops at Lincolnville Centre?

Ans. Yes, sir.

Cr.-int. 26. How far were the shops apart?

Ans. Well, I should think it was a hundred rods.

Cr.-int. 27. Who kept the tavern you have mentioned in 1855?

Ans. Valentine Lancaster.

Cr.-int 28. How long did Lancaster continue to keep that tavern?

Ans. I should think a year and a half or two years. I don't recollect the time.

Cr.-int. 29. Who first asked you to come here and testify?

Ans. No one never asked me. Mr. Dunton said I should be sent for the first of this month; that's all that was said.

Cr.-int. 30. With whom have you talked in regard to your testimony, if anybody, besides your father and Mr. Dunton?

Ans. I havn't talked with anybody.

Cr.-int. 31. Where did your father take lessons of Mr. Dunton in penmanship?

534 Ans. That I don't know, where he was. He used to have copies at home, and pencils, and practice considerable Sundays, but I don't know where he went. I was young when he first commenced.

MARTIN V. TOWER.

Subscribed and sworn to this 3rd day of September, A. D. 1873.

F. DODGE,
Examiner.

CAMDEN, MAINE.

WEDNESDAY, *Sept.* 3—1.30 p. m.

MARTIN V. TOWER recalled by consent.

Direct interrogatories continued:

Int. 11. Did you ever know of the pencil and eraser combined in the possession of your father, Martin W. Tower? And, if so, describe it and state when and where.

(Same objection as to int. 4 to this witness, and also as leading.)

Ans. I have seen the pencil. I don't know anything about the eraser; don't know what you term the name of it. It was a pencil with lead in one end and rubber in the other. I saw it at my father's house in 1856, in the spring he came from Rockland; he said he had it of Alvin R. Dunton.

(Last clause of answer objected to as hearsay.)

Int. 12. What, if anything, did your father do with it?

(Same objection as to last int.)

Ans. He used it for erasing marks when he made one that didn't suit him, in drawing and writing. He used it for drawing cards.

Int. 13. Of what material was that pencil?

(Same objection.)

535 Ans. Wood, lead, and rubber.

Int. 14. How long, to your knowledge, did your father have and use that pencil-eraser?

(Same objection.)

Ans. I don't recollect, sir.

Cross interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 32. To whom have you mentioned the subject of having seen this pencil eraser since you testified this morning?

Ans. To my father. He asked me the question if I'd seen him have the pencil.

Cr.-int. 33. To whom, if to anybody, did you mention the circumstance before?

Ans. Not to any one.

Cr.-int. 34. Where did you first see it?

Ans. At my father's house.

Cr.-int. 35. In what month?

Ans. I don't recollect—soon after my father came back from Rockland in 1856.

Cr.-int. 36. What season of the year was it when you first saw it?

Ans. I don't know, sir; soon after he came back from Rockland; that's all I can say.

Cr.-int. 37. Independently of your father's return from Rockland, have you any recollection whether it was winter or summer that you first saw it?

Ans. I recollect there was snow on the ground.

Cr.-int. 38. How many times did you see it?

Ans. Can't say.

Cr.-int. 39. Positive you saw it more than once?

Ans. Yes, sir.

Cr.-int. 40. Do you swear positively you saw it as many as twenty times?

Ans. No, sir.

Cr.-int. 41. Have you ever seen such a pencil since?

536 Ans. Not exactly—my father used to imitate them by tying a stem—tying and putting a piece of rubber in after taking the lead out, winding a waxed-end round them.

Cr.-int. 42. When and where did you see your father do that?

Ans. See him do it in the western country in 1857.

Cr.-int. 43. Haven't you seen any such pencil in the last two or three days?

Ans. No, sir.

Cr.-int. 44. When was the last one of that kind that you saw?

Ans. In 1857. I take that back; the one I see in 1857 was the one father made in imitation of that he got from Mr. Dunton.

Cr.-int. 45. When did you last see the one he got from Mr. Dunton?

Ans. Last I recollect was in the spring of 1856.

Cr.-int. 46. What colored rubber was there in it?

Ans. Well, a brownish color. I don't recollect exactly the color.

Cr.-int. 47. What colored pencil?

Ans. I don't recollect. Seems to me it was the same color as the wood. I don't recollect for certain. I don't think it was painted.

Cr.-int. 48. Did your father have any other pencils at the same time?

Ans. Some of these common pencils that he used in the shop, where he was noting down anything.

Cr.-int. 49. Did he have any other pencils at the house at the time when he was using the one you have described?

Ans. I don't recollect. I've seen him use a pencil at the house, drawing and writing—the one that he said he had of Dunton.

Cr.-int. 50. When and where did he say Dunton gave it to him?

Ans. Rockland.

Cr.-int. 51. Can you describe any other particular pencil that your father had, and was using at the house at the time he was using the one he said he had of Dunton?

537 Ans. Don't recollect seeing him use any other pencil at the house.

Cr.-int. 52. What was he doing with the pencil when you saw him?

Ans. He was drawing cards, or rather, drawing birds on cards.

Cr.-int. 53. How old were you then?

Ans. Well, I don't recollect; I should have to figure back. I am 34 this month; 1856 and 34 would leave me 17 years old.

Cr.-int. 54. Who else, if any, were present when you father was using said pencil?

Ans. My brother and mother. Brother's name is Franklin M. Tower.

Cr.-int. 55. Were they present every time?

Ans. Not every time; my mother was always present.

Cr.-int. 56. Do you remember any particular time when your brother was present?

Ans. The first time I saw it he was present.

Cr.-int. 57. Do you remember any other time?

Ans. No, sir; I don't remember any other time when I was there and he was present; sometimes we both would be there.

Cr.-int. 58. Did he have the common pencil of which you have spoken, which he used at the shop, at the same time he was using at the house the pencil you say he got from Dunton?

Ans. He had them at the shop; no recollection of seeing them at the house.

Cr.-int. 59. Did he have them at the same time?

Ans. Well, I couldn't say as to that—whether it was the same time he used the common pencil at the shop, or not; I've seen him use them at the shop.

Cr.-int. 60. Can you describe any other particular instruments you saw your father use in 1855?

Ans. I don't recollect seeing him use them in 1855—last part of the winter of 1856, and spring. I don't recollect seeing him use them till school was done.

538 Cr.-int. 61. Do you recollect seeing your father draw any cards in 1855?

Ans. I have.

Cr.-int. 62. Do you know Mr. Crockett, of Rockland?

Ans. I do not.

Additional direct interrogatories:

Int. 1. Did your father use the pencil-eraser which he made in imitation of the one he got from the said Dunton, as he said, in the same manner or for the same purpose as he used that, or otherwise?

(Same objection as that to int. 4 to this witness, and also as leading.

Plaintiff's counsel will move to strike out the evidence, if intended to prove prior use either by the witness or by his father, on the ground that the names of the persons having knowledge of said prior use have not been given in the answer.)

Ans. I didn't see him use it but once; didn't stop with him but a short time after I see him making it.

(Question repeated.)

Ans. He did.

M. F. TOWER.

Subscribed and sworn to before me,

F. DODGE, *Examiner.*

CAMDEN, ME., *Sept.* 3, 1873.

539 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
v.
EBERHARD FABER. } In equity.

The deposition of William R. Matthews, taken on behalf of defendant, at Camden, Maine, September 3d, 1873, before Fred'c Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. William R. Matthews; Belfast, at present; my last business was keeping a boarding-house. I am out of business now; was burnt out.

Int. 2. Are you the same Wm. R. Matthews who was produced and examined as a witness on behalf of complainant in this suit in June last?

Ans. I am, sir.

Int. 3. How long have you lived in Belfast, and from whence did you go there?

Ans. I went there from Lincolnville, about the 20th of May last.

Int. 4. How long prior to that had you resided in Lincolnville, and what part or parts of Lincolnville?

Ans. Lincolnville was my place of nativity, sir. I had resided within about two and a half miles of Lincolnville Centre until the fall of 1857. In the fall of 1857 I moved to the Centre.

Int. 5. Do you know A. R. Dunton; and, if so, how long have you known him?

540 Ans. I do; and I've known him ever since I can remember anybody, almost; perhaps I knew my own parents before I knew him.

Int. 6. Have you always been acquainted with his reputation and character in this community where he has lived; and, if so, what reputation has he always borne?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. Good, as far as I know, sir, or ever heard.

Int. 7. Had it been otherwise, would you or not have known it?

(Same objection.)

Ans. I presume I should.

Int. 8. Did you ever see said A. R. Dunton in said Lincolnville; and, if so, state any particular time and the circumstances.

(Same objection.)

Ans. I have. I did see him in Lincolnville, in the fall of 1855, at the hotel. He had his wife with him at the time—the first time I had seen him or her after his marriage. I was there, at the hotel; he drove up with his wife; they went into the parlor; I followed them in, and he gave me an introduction to his wife. I gave them an invitation to go home with me and spend the night. He said his business was such that he could not. He went to the door with me and looked at a horse. I had a very nice horse that I'd just brought from Aroostook County. That was about all. I left him and went my way. He said, however, that he came from Rockland, and, I think, he said that he was going East. Whether he did go East or not I couldn't say.

(Any statements of Dunton objected to.)

Int. 9. Had you ever before seen the lady who was then his wife?

(Same objection as to 6th.)

541 Ans. I had.

Int. 10. What was her name?

(Same objection.)

Ans. Pendleton; I can't remember her first name. I had known her when she was a little girl, at her father's house, in Hope, Maine.

Int. 11. Did you recognize Dunton's wife, when you were so introduced, as the girl you had formerly known?

(Same objection.)

Ans. I don't know that I should have recognized her as being that girl. I knew, however, that he had married that girl before I saw them there; that is, knew it by hearing. She recognized me; said she recollected seeing me at her father's house at different times.

Int. 12. How long after their marriage was it that you so saw them at Lincolnville?

(Same objection.)

Ans. Well, it was only a very short time from the time I heard they were married till I saw them. It might have been a month, or it might have been not so long.

Int. 13. Who then kept the hotel where you saw them in Lincolnville?

(Same objection.)

Ans. Mr. Lancaster—V. R. Lancaster.

Int. 14. Was Mr. Lancaster acquainted with them, or became then acquainted with them, to your knowledge; and if the latter, how?

(Same objection.)

Ans. That, sir, I do not know. Mr. Lancaster was not at home at the time, and I don't know whether he knew them or did not. I think he did afterwards become acquainted with them.

542 Int. 15. What time in the fall of 1855 was it that you so saw Mr. Dunton and his wife at Lincolnville?

(Same objection.)

Ans. I think the latter part of November; it was in November, but I couldn't come at the precise day, sir.

Int. 16. How do you fix November, 1855, as the time you so saw said A. R. Dunton and his wife at said Lincolnville?

(Same objection.)

Ans. From the fact that I had been to Aroostook County, and brought this horse from there and a two wheeled chaise.

Int. 17. When Silas C. Thomas was assisting said A. R. Dunton and his wife in teaching in 1857, and was boarding at your house, did you ever see in the possession of said Thomas any pencil and eraser combined? and, if so, describe it.

(Same objection.)

Ans. I did not, sir; not at that time.

Int. 18. Did you at any time; and if so, when?

(Same objection.)

Ans. In the latter part of March, in the next year after I saw Dunton at Lincolnville, March, 1856. At that time he wanted to buy a horse; he was peddling books and stationery, and he showed a pencil that he said was a patent pencil. He was talking with a gentleman that boarded at my house, showing it.

(Same objection.)

Int. 19. Describe that pencil as nearly as you can.

(Same objection.)

Ans. Well, I took so little notice of the pencil. Well, it was a wooden pencil, with rubber in one end and pencil in the other;
543 that's all I know about it. I wish to correct, sir, a little error of my own—1858—it was in the spring after they taught the writing-school, in 1857—in the fall of 1857, that I saw the pencil. They didn't show it to me particularly. I thought at first it was 1856, but it was not; it was the spring after they taught the writing-school.

Int. 20. Did Thomas say at that time where or from whom he got that pencil?

(Same objection, and as heresay.)

Ans. Not to my recollection, sir.

Int. 21. Who was the boarder Thomas was so talking with?

(Same objection.)

Ans. It was a young Mr. Fuller, and a Mr. Norton likewise, that was boarding at my house—George Fuller and William H. Norton.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. How do you fix the date of the purchase of the Aroostook County horse?

Ans. From the fact that I knew myself that it was in 1855, and my wife has always been in the habit of keeping a little memorandum, and after this affair she showed it to me with her own hands in her book—when I went and how long I was gone.

Cr.-int. 2. Have you that memorandum-book?

Ans. No, sir; I haven't the satisfaction of having any paper I have had in the past thirty years, having been burnt out in the recent fire in Belfast.

Cr.-int. 3. How long had you lived at Lincolnville prior to your removal to Belfast?

Ans. Always, with the exception of nine months in Boston. A year ago last fall, I shut up my house at Lincolnville and moved to Boston. I kept a boarding-house there, and moved back to Lincolnville
544 within nine months. I carried a very small portion of my furniture; just went for the time being—that's all.

Cr.-int. 4. Did you ever hear any accusations against Mr. Dunton, or of any criminal proceedings being had against him, either here or in the State of New York?

Ans. I never did, sir.

Cr.-int. 5. Did you ever hear of imputations against Mr. Dunton's character, to which he replied by a published pamphlet?

Ans. I never did, sir.

WILLIAM R. MATHEWS.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

CAMDEN, MAINE, *Sept.* 3, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
v.
EBERHARD FABER. } In equity.

The deposition of GEOGER W. WHITE, taken on behalf of the defendant, at Camden, Maine, Sept. 3, 1873, before Frederic Dodge, examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. George W. White; Rockland; register of deeds for Knox County.

545 Int. 2. How long have you been register of deeds for Knox County?

Ans. Thirteen years; since the 1st April, 1860; at first by appointment for two years and nine months, after that by election by the people.

Int. 3. Do you know either of the parties to this suit?

Ans. No, sir; not as you state it to me—plaintiff and defendant—I know neither of them.

Int. 4. Are you acquainted with Alvin R. Dunton? If so, how long have you known him?

Ans. I am; known him since 1829.

Int. 5. Did you see said Dunton in February last? If so, where, and under what circumstances?

(Objected to as not in rebuttal, immaterial, and irrelevant.)

Ans. I saw Mr. Dutton on board the steamer that plied last winter along the coast, in the early part of the third week in February. I went aboard the steamer at Rockland. When I got on board the boat I found Mr. Dunton, spoke with him, and had considerable conversation.

Int. 6. State whether you occupied the same room on board the steamer with said Dunton or not; and, if so, for how long?

(Same objection.)

Ans. I occupied the state-room with Mr. Dunton, at his invitation, for one night; the night that I went aboard the boat.

Int. 7. What day of February was that?

(Same objection.)

Ans. I think it was the 18th.

Int. 8. Where did you leave the steamer?

(Same objection.)

Ans. At Portland. The night was stormy; we went into Portland for a harbor. I left and went to Boston by rail; it must have been the 19th we reached Portland.

546 Int. 9. How do you fix those dates as the 18th and 19th of February last?

(Same objection.)

Ans. From having visited Boston the second time on the last day of March, I know that this time was some five or six weeks previous. I wish to add that I left on my return the same week on Saturday, there having been a violent storm, and I have found among my papers a letter from my son, who resides in East Boston, dated Sunday, February 23d, (testimony to contents of letter objected to, unless the original is produced or its absence accounted for,) making inquiries about how I got home, whether I had any trouble in getting home. I have not the letter with me.

Int. 10. What day of the week did you leave Rockland on that steamer?

(Same objection.)

Ans. It was the regular day of the week that the steamer left. I don't remember whether Tuesday or Wednesday. I think it was Tuesday night.

Int. 11. How long did you remain in Boston after you went there?

(Same objection.)

Ans. If the steamer left Tuesday night, it was on Wednesday night that I arrived in Boston, and I left on the following Saturday morning.

Int. 12. Did said A. R. Dunton on that occasion show you anything; and, if so, what?

(Same objection.)

Ans. He did; he showed me a pencil that he had with him.

Int. 13. Describe it.

(Same objection.)

Ans. It was a common wood-colored pencil, which had been cut
547 away, a portion of it, for the purpose of sharpening, I suppose. He pointed out to me (anything said by Dunton objected to as hearsay) that which he first read over himself and then I read, taking it for the purpose; the letters on the pencil were "K" and "Blunt;" to my recollection there was on the other side the word "London," and some others. I don't remember exactly. One end of the pencil was common lead, the other end was some dark substance. I only know from what he said; he said it was rubber; and he further showed me, and stated, too, that he cut away the end of the pencil to insert the rubber. I would say, cut away a portion of the end.

Int. 14. Would you recognize that pencil, which he then showed you, now, if you saw it?

(Same objection.)

Ans. I think I would.

Int. 15. Please look at the pencil-eraser now shown you, (defendant's Exhibit E,) and state whether that was the pencil shown you by said Dunton on that occasion, as you have testified.

(Same objection.)

Ans. It is either the same pencil or one of that kind prepared with those marks on it, precisely like it. It looks just like the one that he showed me.

Int. 16. Have you seen that pencil at all since the time he so showed it to you until now, when it was first placed in your hands?

(Same objection.)

Ans. I have not.

Int. 17. Did said Dunton inform you where he got that pencil, and what it was for; and, if so, what did he say?

(Objected to as above and as hearsay.)

Ans. He said he got it at Mr. or Mrs. Thomas' in Camden. I
548 am not positive which; am very confident it was Mrs. Thomas'.

He said it had been at Mrs. Thomas' since 1855 or 1856. He informed me there was a case pending in the U. S. district court; that he wished to prove or show that he had manufactured those pencils with rubber in one end previous to that time. He further said that when he returned to Boston he should ascertain who the parties were that manufactured the pencils, by the name on it, and how long they had manufactured them—part of the name being gone. He wished to ascertain that fact, he said, so that he could swear positively as to the time when he left the pencil with Mrs. Thomas. I understood him to say that he made it.

Cross-interrogatories proposed de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto.

Cr.-int. 1. Who did you suppose was the party defendant in this suit, when you came to testify?

Ans. I had been informed that a person by the name of Faber; was so informed by Mr. Dunton, also by Mr. Sprague, editor of the Free Press, who mentioned to me that he had attended as a witness and given his deposition.

Cr.-int. 2. Did you suppose Mr. Dunton was one of the parties to the suit?

Ans. I did not know what interest he might have. He informed me that he had an interest in the matter and had manufactured that style of pencil before the patent-right had been taken out.

Cr.-int. 3. Did he ask you to come and testify?

Ans. He informed me that he should want to take my deposition.

Cr.-int. 4. Did he so inform you when he met you on the boat?

Ans. No, sir.

Additional direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto.

Int. 18. Were you subpœnaed to attend as a witness here?

549 Ans. I was.

Int. 19. And came in accordance with that summons?

Ans. I did.

GEORGE W. WHITE.

(Complainants give notice that they will move to strike out the testimony of this witness for the reasons given at the 4th int. to Martin V. Tower above.)

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

CAMDEN, ME., *Sept.* 3, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of WM. H. DODGES, taken on behalf of the defendant, at Camden, Me., Sept. 3, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. William H. Hodges, Lincolnville, Maine; principally farming, summers; teaching, winters.

Int. 2. You are the same Wm. H. Hodges, are you not, who testified in this suit, on behalf of the complainant, in June last?

Ans. I am.

550 Int. 3. In answer to the 18th cross-interrogatory in that deposition—whether you saw A. R. Dunton with his wife in Lincolnville or vicinity in 1855—you answered, "Not to my knowledge." Please state what your occupation was during the fall of 1855.

(Objected to as not rebutting, and immaterial and irrelevant.)

Ans. Teaching in Lincolnville, about three miles from Lincolnville Centre.

Int. 4. Had said Dunton and his wife been at said Lincolnville Centre during that time, would you have seen them or been likely to know of it?

(Same objection.)

Ans. I should not have been likely to have seen them without it had been Saturday or Sunday that they were there. On those days I made it my home at the public house. I boarded there prior to my teaching, and my Saturdays and Sundays I spent there.

WM. H. HODGES.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

CAMDEN, *Sept.* 8, 1873.

551 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of ALBION DRAKE, taken on behalf of the defendant, at Camden, Maine, Sept. 3, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Albion Drake, Lincolnville, Maine; haven't done much of anything for the last year or two; am deputy sheriff.

Int. 2. How long have you been deputy sheriff, and for what county?

Ans. Waldo County—for thirteen or fourteen years.

Int. 3. Do you know the parties to this suit?

Ans. Unless Mr. Dunton is a party, I do not.

(Question repeated, and names of parties stated to the witness.)

Ans. I do not.

Int. 4. Do you know Alvin R. Dunton; if so, how long have you known him?

Ans. I know him, I can't tell how long. I should think between thirty-five and forty-five years. It's over thirty-five years ago since I was acquainted with him.

Int. 5. Do you remember seeing him and his wife together in Maine; and, if so, what was the first occasion and where?

552 (Objected to as not rebutting, immaterial, and irrelevant.)

Ans. Well, I saw Mr. Dunton ride through our place, Lincolnville, to the public house—he had a woman in the carriage with him.

Some one side of me said as he went by that is Mr. Dunton and his wife, just married.

(Statements of other persons objected to as hearsay.)

Int. 6. To the best of your recollection when was that?

(Same objection as to the last int.)

Ans. In 1855.

Int. 7. What time in 1855?

(Same objection.)

Ans. I couldn't say.

Int. 8. Where were you then residing?

(Same objection.)

Ans. Where I now do—in Lincolnville.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. What makes you think it was 1855?

Ans. I moved in 1855 where I now live, and I think it was after I moved and at the time Mr. Lancaster kept the tavern, that makes me think it was 1855.

Cr.-int. 2. What kind of vehicle was he driving?

Ans. I think it was a covered carriage.

Cr.-int. 3. In what month of the year was it?

Ans. Couldn't tell you, sir.

ALBION DRAKE.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

CAMDEN, *Sept.* 3d, 1873.

(Same notice as to striking out given as in deposition of witness Tower, by complainant's counsel.)

553 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of MILES FULLER, taken on behalf of the defendant, at Camden, Me., Sept. 3, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Miles Fuller; Lincolnville; work at the carriage business mostly; farming, some.

Int. 2. Do you know either of the parties to this suit?

Ans. I do not.

Int. 3. Are you acquainted with A. R. Dunton? If so, how long have you known him?

Ans. Since 1836 or 1837.

Int. 4. Did you know of said Dunton being married to his second wife; and, if so, when next after that did you see him, and where?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. I never knew of his being married till I saw him at our place.

Int. 5. State when that was, and what occurred.

(Same objection.)

Ans. It was shortly after he was married I saw him there. I went to the public house; met Mr. Matthews at the door—William R. Matthews; and he says to me, says he, "Have you seen A. R. Dunton and
554 his wife?" and says I "No, I have not;" and didn't know he was married, and he said they were there and he'd just had an introduction to his wife. I went into the office and saw Dunton there. I had some talk with him there; there was some three or four or half a dozen old friends of his. I think we took some wine together or something of that kind—what there was in the office.

Int. 6. When was that?

(Same objection.)

Ans. Well, that was in 1855, I think, according to the best reckoning I can get.

Int. 7. What time in 1855?

(Same objection.)

Ans. I couldn't tell you, sir, only the man said he started for Belfast and couldn't proceed on his journey, the going was so bad—I forget whether it was the first or last of October or first or last of November—I couldn't tell.

Int. 8. What was the conversation you had with Mr. Dunton?

(Objected to as above and as hearsay.)

Ans. Oh, we passed the time of day same as old friends generally do, and joked him about being married and the like.

Int. 9. Did he tell you he had been just married?

(Same objection.)

Ans. Yes, sir.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. Did Mr. Dunton ask you to come and testify in this case?

Ans. He did not, sir.

555 Cr.-int. 2. Have you spoken to Mr. Dunton about your testifying in this case?

Ans. I have not.

Cr.-int. 3. Have you talked with Mr. Dunton about the case at all?

Ans. He asked me if I recollected of his being there at that time.

Cr.-int. 4. When did he ask you that?

Ans. I should judge, some five or six weeks ago; from four to six, I should think.

Cr.-int. 5. Where did he see you?

Ans. At my place.

Cr.-int. 6. Did he come to see you?

Ans. I couldn't tell what he was there for; he was there, whether he came to see me or others.

Cr.-int. 7. Have you seen him here to-day?

Ans. Yes, sir.

(Same notice as to striking out given by complainants as to last witness and Tower.)

Additional direct interrogatory by J. S. Washburn, esq., and answer of witness thereto:

Int. 10. Were you subpœnaed to come here to-day?

Ans. I was, and I came accordingly.

MILES FULLER.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

CAMDEN, *Sept.* 3, 1873.

556 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of WARNER C. TOWER, taken on behalf of the defendant, at Camden, Maine, Sept. 3, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Warner C. Tower; Lincolnville, Maine. I am farming some and manufacture lime—formerly boots and shoes.

Int. 2. Do you know either of the parties to this suit—Reckendorfer or Faber?

Ans. I do not.

Int. 3. Do you know Alvin R. Dunton; if so, how long have you known him?

Ans. I have known him some twenty-five years, I believe it is; yes, I should think, as much as thirty. I went to school to him when he taught writing at Lincolnville Centre, somewhere about 1837.

Int. 4. Did you know of his being married to his second wife; and, if so, where and when did you first see him after that, and what occurred?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. He rode into the place, at Lincolnville Centre, I think the year of 1855; I think it was in November. I happened to be in the street the time when he arrived.

557 Int. 5. Who kept the hotel at that time?

(Same objection.)

Ans. I think it was Mr. Lancaster—Valentine Lancaster—and, I think, Mr. Townsend was with him. He was with him a spell. The last part of the year, I think.

Int. 6. Did you have any conversation with Mr. Dunton at that time; and, if so, what?

(Objected to as before, and as hearsay.)

Ans. I think I passed the time of day with him, and I think that he introduced me to his wife on the street.

Int. 7. Did he give you anything?

(Same objection as to 5.)

Ans. No, sir.

Int. 8. Did he say anything about his place of business in Boston?

(Same objection.)

Ans. I don't recollect as he did.

Int. 9. Did he say anything about where he lived or boarded in Boston?

(Same objection.)

Ans. I don't know as he did.

Int. 10. Do you remember Dunton's teaching in Lincolnville in 1857?

(Same objection.)

Ans. Yes, sir. I do recollect that he taught writing there.

Int. 11. Do you remember his using a certain pencil there at that time? And, if so, describe it.

(Same objection.)

558 Ans. He had a pencil there that he said he manufactured. I didn't pay much attention to it. He told something about the ingredients it was made of.

Int. 12. Did you see it?

(Same objection.)

Ans. I did not examine it.

Int. 13. Do you remember any peculiarity it had; and, if so, what?

(Same objection.)

Ans. I didn't take notice of that, because I didn't care enough about it.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. How long did Mr. Lancaster keep the tavern at Lincolnville Centre?

Ans. About two years, I think; not longer than that; then he sold out to a man named Mr. Holt. In 1855 he put up the sign; then he went into trade there.

Cr.-int. 2. That is, he kept it about two years from 1855?

Ans. Yes, sir, I think he did; about two years.

Cr.-int. 3. Was he about the house after he sold out?

Ans. He was about there occasionally. He built a new house right opposite. I don't recollect about the bar.

WARNER C. TOWER.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

CAMDEN, *Sept. 3d*, 1872.

(Same notice by complainant as to striking out as in last deposition.)

559 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of MARTIN W. TOWER, taken on behalf of defendant, at Camden, Maine, Sept. 3, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. Martin W. Tower; Rockland; boots and shoes.

Int. 2. You have been a justice of the peace for Waldo County, have you not; and, if so, how long?

Ans. I have, for three terms; seven years each term; over twenty years in all.

Int. 3. Do you know either of the parties to this suit?

Ans. No, sir.

Int. 4. Are you acquainted with A. R. Dunton? If so, how long have you known him?

Ans. Ever since he was quite a small boy, some ten or eleven years of age I should think he was, when I first knew him.

Int. 5. Prior to your going to Rockland, where did you reside?

Ans. In Lincolnville Centre.

Int. 6. Were you absent from Lincolnville at any time after 1855? If so, when, and how long, and where?

Ans. I think it was four years; in the State of Illinois.

Int. 7. When did you go to Illinois?

Ans. In April, 1857.

560 Int. 8. What were you engaged in there?

Ans. I was teaching penmanship part of the time, and part of the time I worked at my boot and shoe trade.

Int. 9. Where did you go when you left Illinois?

Ans. In 1861 I enlisted in the Army, in the 12th Illinois.

Int. 10. How long were you engaged in the war?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. Three years and four months, I think.

Int. 11. Did you know of A. R. Dunton being married to his second wife? If so, when did you first see him after that, and where, and what occurred?

(Same objection.)

Ans. At Centre Lincolnville in the fall of 1855; it was quite cold weather; in November, I think. I was very anxious, being so well acquainted with Mr. Dunton, being qualified under his instructions as a teacher; I went across the road after I saw him drive up to the hotel and was introduced to his wife; was very much pleased with her, never having seen her before; and I spoke to him about some specimens, if I could get some, and also a style to mark enameled cards with. He had none with him, but said he would send me some as soon as he got back to Boston. He sent them.

Int. 12. Who kept the hotel at the time?

(Same objection.)

Ans. Mr. Lancaster—Valentine—and Mr. Townsend, his brother-in-law.

Int. 13. Were you at the Institute in Rockland when Mr. Dunton taught there in the fall of 1856?

(Objected to as above, and also as leading and assuming what is not proved.)

Ans. Yes, sir.

561 Int. 14. Had you any occupation in Rockland in 1856; and, if so, at what time?

(Same objection as to int. 12.)

Ans. I think it was August I went down there, and worked till next January for R. L. Jackson—boots and shoes.

Int. 15. Was Mr. Dunton there at the time? If so, what was he doing?

(Same objection.)

Ans. He was teaching the teachers in the Institutes.

Int. 16. How do you know?

(Same objection.)

Ans. I know he told me so, and I went into the school-house and saw him teaching.

Int. 17. Did you see him drawing any cards at that time?
(Same objection.)
Ans. No; I saw him drawing cards in his private room at that time. He made me out quite a number of specimens at Rockland that time to practice from.
Int. 18. What did he draw those specimens with?
(Same objection.)
Ans. With a pen, I suppose. They were notices and bills for me to stick up.
Int. 19. What did he draw cards with at that time?
(Same objection.)
Ans. With what he called a stylus—a composition in one end and rubber in the other.
Int. 20. What material was the rubber and marking composition enclosed in at the different ends?
(Same objection, and as leading and assuming what witness has not stated.)
562 Ans. Common wooden stock. He said he manufactured the composition and put the rubber into the pencil himself. The rubber was similar to this. (A piece produced by the witness, and marked for identification by the magistrate with his initials, at the request of complainant.)
Int. 21. Have you ever seen a pencil having rubber in one end and lead in the other; and, if so, when and where?
(Same objection as to 19.)
Ans. In Rockland. I asked him to let me have one, and he showed me how to manufacture it. He also gave me a recipe to make the lead and to put in the rubber at the other end. When I made a mark too large I could correct it till it suited my eye.
Int. 22. Did you ever use such a pencil-eraser after that yourself?
(Same objection.)
Ans. Yes.
Int. 23. Where did you get the first one that you used?
(Same objection.)
Ans. Got it of Dunton.
Int. 24. When and where?
(Same objection.)
Ans. Why, the first one I got I got of Dunton, in Rockland, in the fall of 1856.
Int. 25. Did you get it of him at the same time that he showed you how to make them?
(Same objection.)
Ans. Yes, sir.
Int. 26. Of what material was the pencil in which the lead and rubber were enclosed, which Dunton so gave you, composed?
563 (Same objection, and as leading and assuming what witness has not said.)
Ans. Bismuth.
(Question repeated.)
Ans. Wood.
Int. 27. What do you mean by bismuth in your last answer?
(Same objection as to 19th int.)
Ans. That is what the lead in the pencil is colored with. Bismuth, lead, antimony, Brittania, type-metal; sometimes silver, to alter the shade.

Int. 28. Did you ever use any other pencil, with lead in one end and rubber in the other, than that one said Dunton gave you?

(Same objection.)

Ans. Yes, sir.

Int. 29. How many, and where did they come from?

(Same objection.)

Ans. Made them myself, and sold them to a good many others. I couldn't tell now how many—quite a number.

Int. 30. What did you use these pencil-erasers for?

(Same objection.)

Ans. To take off the shade when we got it too dark.

Int. 31. Where did you use them—in what places?

(Same objection.)

Ans. Chicago, Illinois; Chilicothe, Princeton, Peoria, etc.

Int. 32. What were you doing at those places?

(Same objection.)

Ans. Teaching penmanship.

564 Int. 33. Did you use these pencil-erasers in teaching at those places?

(Same objection.)

Ans. Yes, sir.

Int. 34. How did Dunton tell you how to make them in 1856?

(Same objection.)

Ans. Simply make a little incision round the pencil, and then split the pencil and insert the rubber, wind it with a fine string and glue it; take the lead out before inserting the rubber.

Int. 35. What kind of pencil did you take for that?

(Same objection.)

Ans. Common soft wood, so I could split it open and have two parts, without the trouble of taking out the lead to insert the rubber.

WEDNESDAY, *Sept.* 3*d*, 1873—6 p. m.—Examination adjourned by consent until to-morrow, at 9 a. m.

THURSDAY, *September* 4, 1873.

(Testimony continued, pursuant to adjournment.)

Cross-interrogatories proposed de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. What was the recipe which you say Dunton gave you for making metallic styles?

Ans. Lead, bismuth, type-metal, Brittania; once in a while put in a little silver; antimony.

Cr.-int. 2. In what proportions were those ingredients used?

Ans. Very nearly equal parts; more lead than any other.

Cr-int. 3. How much more lead?

565 Ans. Couldn't tell; never weighed it.

Cr.-int. 4. Then there were no given proportions of weight to be followed in making the amalgam, but you merely guessed at the proportions of the ingredients to be used?

Ans. Yes, sir.

Cr.-int. 5. Were those ingredients which you say were used in about equal proportions, equal proportions in weight or equal proportions in bulk?

Ans. Equal proportions in bulk; simply guessed at it; it didn't make any great material difference.

Cr.-int. 6. Where did you get the metal with which you made the style which you say you made after Dunton gave you the style at Rockland?

(Objected to as assuming what the witness had not testified to.)

Ans. Got it in Chicago; went to a goldsmith and got the things, compounded it; made it and drew it out into a wire; got the bismuth at a druggist's, and antimony; could get the silver most anywhere—get it off a piece of coin—and lead also.

Cr.-int. 7. Where did you get the type-metal used in that style?

Ans. Got it of the printers where there was old pieces of type that was worn out.

Cr.-int. 8. What printers?

Ans. I disremember now what their name was. It was in Chicago; I forget the name of the press. Can get plenty of it at most any printing-office.

Cr.-int. 9. Where was their places of business—what street?

Ans. On Lake street.

Cr.-int. 10. What part of Lake street?

Ans. Well, I forget the number.

Cr.-int. 11. Between what streets on Lake street?

Ans. Will you please let me ask one question. You are getting the evidence of the style now, not of the pencil and rubber?

566–568 Cr.-int. 12. I am getting the evidence of where you got the type-metal which formed one of the ingredients of the metallic style which you have stated you made, and procured the materials for making, in Chicago, and the former question is repeated.

Ans. That I couldn't tell, it was so long ago. I want to ask one question. The recipe for compounding the metal was in 1845. The simple question about pencil with rubber in the end, that was in 1856, in Rockland. I didn't know but you might have misunderstood me yesterday.

Cr.-int. 13. Then it was the styles that you made and sold in Chicago, Peoria, and other places that you have mentioned in the West; and they were composed according to the recipe which you had already obtained in 1845?

(Objected to as an assumption of what the witness has not said, but, on the contrary, has already testified otherwise.)

Ans. Yes, sir; not touching the pencil and rubber.

Cr.-int. 14. Where did you first go when you left Lincolnville for the West, in April, 1857?

Ans. Went to Dubuque, in Iowa.

Cr.-int. 15. What did you do there, and how long did you remain there?

Ans. I remained there about three months; I worked at boot-making while I was there.

Cr.-int. 16. How did you come to go West?

Ans. I went West with the intention of writing and working at my trade, to make a location and remove there with my family. My son was with me. He got dissatisfied and returned home. I went down to Illinois, down to Princeton.

Cr.-int. 17. Did you go from Dubuque to Princeton?

Ans. Yes, sir; that is, I went to Chicago, and from there to Princeton.

Cr.-int. 18. Which son was with you?

Ans. Martin Van Buren.

569 Cr.-int. 19. You have other sons?

Ans. Yes, sir.

hat are their names?

Ans. Francis Marrion and Prince Albert.

Cr.-int. 21. Do they all live here?

Ans. One lives in Lincolnville and the other lives in Rockland.

Cr.-int. 22. Which lives in Rockland?

Ans. There's two, Marrion and Prince Albert.

Cr.-int. 23. How long did you remain in Chicago before going to Princeton?

Ans. Twenty-four hours.

Cr.-int. 24. How long did you remain in Princeton, and what did you do there?

Ans. I worked at my boot and shoe trade for a man by the name of Barr. Staid from the 20th of July till some time in December.

Cr.-int. 25. Where did you next go?

Ans. Went from there to the town of Buda, Illinois.

Cr.-int. 26. What did you do there, and how long did you remain?

Ans. Worked at my boot-trade; gave lessons in penmanship, evenings, for a fortnight. Three weeks I was there only.

Cr.-int. 27. Where did you go next?

Ans. Down to Peoria City, on the Illinois Railroad.

Cr.-int. 28. What did you do there, and how long did you remain?

Ans. I remained there for a week, or about six days; didn't do anything; boarded at the hotel.

Cr.-int. 29. Where did you next go?

Ans. Southampton.

Cr.-int. 30. What did you do there, and how long did you remain?

Ans. Merely stopped to pay a visit to some old acquaintance I had there; a man by the name of Nelson—O. L. Nelson; was there about ten days.

Cr.-int. 31. Where did you next go?

Ans. To Northampton.

570 Cr.-int. 32. What did you do there, and how long did you remain?

Ans. I was there something like six weeks; gave a course of lessons in penmanship.

Cr.-int. 33. Where did you next go?

Ans. Down to Chilicothe.

Cr.-int. 34. What did you do there, and how long did you remain?

Ans. I opened a little shoe-shop. I remained a very short time; got dissatisfied with the place, sold out, and came down to Pekin. Some five or six weeks I was there.

Cr.-int. 35. How long did you remain at Pekin, and what did you do there?

Ans. I didn't stop there but a few days; something like three, I think.

Cr.-int. 36. Where did you next go?

Ans. Went to a little town about eight miles from Pekin; can't remember the name. I have a very poor memory for names of towns where I don't stay long. There was a merchant there from whom the town was named; Pettee, I think, or some such name; in Tazewell County.

Cr.-int. 37. What did you do there, and how long did you remain?

Ans. I worked for a gentleman in the boot business; I was trying to remember how long; began in September and worked till the next spring.

Cr.-int. 38. Where did you next go?

Ans. Northampton.

Cr.-int. 39. What did you do there, and how long did you remain?

Ans. Worked at my trade and gave a course of lessons in penmanship there; some three months, I think; might be more.

Cr.-int. 40. Where did you next go?

Ans. Came back to Princeton.

Cr.-int. 41. What did you do there, and how long did you remain?

571 Ans. Well, I stopped at my wife's sister's, Mrs. Herrick, some four weeks; thence I went to Malden.

Cr.-int. 42. What did you do there, and how long did you remain?

Ans. Carried on the boot and shoe business. In the spring of 1861 I went into the Army.

Cr.-int. 43. Where did you enlist?

Ans. Princeton.

Cr.-int. 44. In whose company?

Ans. I forget. His name is Farris—Dr. Farris, or Ferris. I forget his given name. Lieutenant Mills.

Cr.-int. 45. What was the letter of your company when the regiment was organized?

Ans. Company I.

Cr.-int. 46. Where was the regiment organized, or mustered in?

Ans. Down at Springfield, I think. It was that or Cairo; I forget which.

Cr.-int. 47. Who was the colonel?

Ans. Col. McArthur, of Chicago; Lieutenant-Colonel Shetland, of Chicago.

Cr.-int. 48. Did you remain at Malden and Princeton till you enlisted?

Ans. Yes, sir.

Cr.-int. 49. Were any of your sons with you, after the return of your son Martin V. B. to the East, up to the time you enlisted?

Ans. No, sir; they were in the War Department; but they were down on the Potomac.

Cr.-int. 50. That was after your enlistment. I understand you to say there were none of them with you up to the time you enlisted after your son Martin left you and returned to the East. Is that correct?

Ans. That is correct.

Cr.-int. 51. Where was your regiment first sent?

Ans. To Cairo.

Cr.-int. 52. Into whose brigade was it first put?

Ans. Well, in fact, I can't remember.

Cr.-int. 53. Were you made part of Gen. Lyon's command?

572 Ans. Yes, sir; I think so.

Cr.-int. 54. Can you tell whether the metal at the end of defendant's Exhibit K is the same or similar to the metal you have described in your testimony as employed by you in the manufacture of styles? Does it appear about like that? (Exhibit K shown the witness.)

Ans. It looks a little like it. I could tell if I had an enameled card.

Cr.-int. 55. What was the process in manufacturing the metal for the style, so far as the preparation of the metal was concerned? Were the ingredients melted together, or how were they compounded?

Ans. That's more than I can tell, as I always employed a gunsmith or goldsmith to melt it together and draw it into a wire, so I could make a hole with an awl, insert whatever length I wanted, and cut it off.

Cr.-int. 56. You could furnish the gunsmith or goldsmith with the ingredients?

Ans. Yes, sir; or give them the receipt to go get it themselves.

Cr.-int. 57. And you don't know whether they melted it together, or how they compounded it?

Ans. Well, I suppose they must have smelted it.

Cr.-int. 58. How long did it use to take them?

Ans. I disremember; don't know as I ever asked them the question. I used to give them time enough to do it—to make a wire.

Cr.-int. 59. That is, you'd give them the orders, and they'd deliver it to you in the course of a day or two?

Ans. A day or two, or more; I couldn't recollect exactly now. Always gave them plenty of time.

Cr.-int. 60. Where were you mustered out of the service—out of the 12th?

Ans. I had my discharge from the hospital in St. Louis.

Cr.-int. 61. Where did you then go?

Ans. I went down home. I was wounded at the battle of Shiloh; had a turn of the typhoid fever, and they gave me my discharge. By home I mean down East here to Lincolnville. I got home in Au-
573 gust. The 9th of September I enlisted here as a recruit; went into the 7th Maine, Col. Mason.

Cr.-int. 62. Do you remember what hotel, if any, you stopped at when you passed through Chicago on your way from Dubuque to Princeton?

Ans. I came direct on a railroad through Chicago.

Cr.-int. 63. Well, didn't you stop there at all?

Ans. Twenty-four hours; took the cars the next morning.

Cr.-int. 64. You passed the night there?

Ans. Yes, sir.

Cr.-int. 65. When were you next in Chicago, and where did you stop?

Ans. When I came through in 1862 from St. Louis, coming East here.

Cr.-int. 66. Did you pass through Chicago on your way to Dubuque when you first went West, in 1857?

Ans. Yes, sir.

Cr.-int. 67. How long did you stop there then, if at all?

Ans. No longer than we could shift trains, carry baggage from one depot to the other.

Cr.-int. 68. And the next time after that was when you passed through on your way from Dubuque to Princeton; is that correct?

Ans. Yes, sir.

Cr.-int. 69. Prior to seeing Mr. Dunton at Rockland, had you made any styles yourself since he gave you the receipt in 1845?

Ans. As I stated yesterday, I made a great many, sold a great many; that is, quite a number, between 1855 and 1856.

Cr.-int. 70. Did you make a great many and sell a great many after 1856?

Ans. None, only for my own use.

(Complainant requests the magistrate to certify, and he does hereby certify, that the above question was first put, "And you made a great many and sold a great many after 1856;" which was objected to by defendant as assuming what had not been stated by the witness; whereupon it was altered by said complainant as put.)

574 Cr.-int. 71. Where was you mustered in, when you enlisted in the 7th Maine?

Ans. Portland.

Cr.-int. 72. Did you ever sell a common pencil with lead in one end and rubber in the other?

Ans. Yes, sir.

Cr.-int. 73. Who made the one you sold?

Ans. Made it myself.

Cr.-int. 74. What price did you get for it?

Ans. Fifty or seventy-five cents; I forget. Sold it to one of my pupils.

Cr.-int. 75. How much did the lead-pencil cost for which you got fifty or seventy-five cents?

Ans. Ten cents, I believe, before I put the rubber in.

Cr.-int. 76. Where did you buy the pencil?

Ans. Believe it was in Princeton. Mr. Baker, of Indiana, a professor of penmanship, was there, and I was frequently into his academy-rooms, and he importuned me to assist him about penmanship. He kept a commercial college.

Cr.-int. 77. Was that the first or second time you were in Princeton?

Ans. That's the time that I came from Dubuque, in 1857.

Cr.-int. 78. What was the name of the pupil to whom you sold the pencil?

Ans. I think his name was Eaton, of Northampton.

Cr.-int. 79. That was when you gave the course of penmanship there?

Ans. Yes, sir.

Cr.-int. 80. How many others did you sell there, if any?

Ans. I disremember now. I used to give away quite a number to young ladies who were learning to draw.

Cr.-int. 81. Do you remember the full name of Eaton, of Northampton, to whom you made the sale for fifty or seventy-five cents?

Ans. No, sir. I'm very hard to remember names; very hard.

575 Cr.-int. 82. Is the sale to Eaton the first sale you can remember?

Ans. I forget. I made a number for my nephews I had in Princeton; I never charged them anything.

Cr.-int. 83. What were the names of your nephews?

Ans. Franklin Herrick was one—or Francis—they called him Frank. One by the name of Israel, his brother. Israel was a school-master; that is, taught school winters.

Cr.-int. 84. Were they all the nephews you had at Princeton?

Ans. No, sir; a number of younger ones than they are. One's name was Washington.

Cr.-int. 85. Give the names of all those for whom you are willing to swear positively you made a lead-pencil with rubber in the end.

Ans. I could not do it. I disremember the names.

Cr.-int. 86. Can you swear positively to having made such a pencil for any one of your said nephews?

Ans. Yes; Frank and Israel. I didn't sell them; I gave them to them, and styluses for making cards—or styles, I believe they call them.

Cr.-int. 87. Where was Frank when you made him such a pencil?

Ans. At home, in his father's house, in Princeton. I was stopping there then. He was learning to draw.

Cr.-int. 88. Where was Israel then?

Ans. He was at home.

Cr.-int. 89. To whom else did you ever sell such a pencil besides Eaton?

Ans. I was trying to think of the name, but I can't now.

Cr.-int. 90. Where was it?

Ans. The town where I was trying to think—Pettee or some such name. I used to furnish pupils wherever I was.

Cr.-int. 91. Can you remember any other sale in Tazewell County?

Ans. Whenever I was teaching and drawing cards, I used to fur-

676 nish them with all pencils and styluses they wanted, without charging them anything more than a common tuition.

Cr.-int. 92. Did all the pencils you furnished them have rubber in the end?

Ans. No, sir.

Cr.-int. 93. Can you give the name of any other person to whom you sold a pencil with rubber in the end, from the year 1856 to the present time?

Ans. No, sir; it's been such a great number of years that I've forgotten the principal part of all the pupils that I've ever instructed.

Cr.-int. 94. Can you name any other town or place where you are willing to swear you made such sale, except the town of Northampton and the town you think is called Pettee, in Tazewell County?

Ans. No, sir; it doesn't occur to my mind now; I couldn't positively tell. This Mr. Eaton, I believe, became a doctor after I left there—studied medicine.

Cr.-int. 95. Where was he when you last heard of him?

Ans. I think he was in Chilicothe.

Cr.-int. 96. When was that?

Ans. I think it was in 1858.

Cr.-int. 97. Can you give me the name of any young lady to whom you are willing to swear positively you gave a pencil with rubber in the end?

Ans. No, sir; I could not.

Cr.-int. 98. Can you give the name of any person whomsoever to whom you are willing to swear positively you gave such a pencil?

(Complainant here requests the magistrate to certify, and he does certify, that, upon reading the above question, he having originally written "such pencil," he said to Mr. Wetmore "'such a pencil', I suppose;" to which Mr. Wetmore replied, "'such' or 'such a,' either is correct." Upon which Mr. Washburn, counsel for defendant, said, "But he has already testified that he gave some pencils. You mean others, I suppose," to Mr. Wetmore. Complainant further requests the magistrate to certify, and he does certify, that the remark was made in the hearing of the witness.)

577 Ans. No; it's impossible; for, as I've said before, I can't remember the hundredth part of the names I've dealt with in any sort of business.

Cr.-int. 99. Where did you make the first pencil you ever made with India rubber in the end?

Ans. I disremember; I kept the one Dunton let me have a long while for my own use. I lost that, and then I went to work making some for myself and others.

Cr.-int. 100. Where were you living when you lost the one Dunton gave you?

Ans. I disremember what place it was. It was in Malden I made the first one for myself.

Cr.-int. 101. Where did you make the last one you made?

Ans. I forget.

Cr.-int. 102. To the best of your recollection?

Ans. I was trying to think whether it was in the hospital at Portsmouth Grove, while I was there. They used to come after them a good deal, the officers for their ladies, after I got so I could set up to busy myself. I haven't had anything to do with such business since the war ended. I had my right hand all smashed to pieces by a shell, so I can't use it any.

Cr.-int. 103. Where did you last see any one of the pencils with rubber in the end made by yourself, to the best of your recollection?

Ans. In the town of Buda. I got burnt out there—burnt up everything I possessed. In Illinois, about three years ago. I used to mark cards there for the young people, and do some ornamental writing—three years ago last spring.

Cr.-int. 104. Was Portsmouth Grove Hospital, in Rhode Island, near Newport?

Ans. Yes, sir.

Cr.-int. 105. In what battle were you wounded?

Ans. Battle of Shiloh.

(No cr.-int. 106—a mistake in numbering. F. D., Exr.)

Cr.-int. 107. It was after that that you enlisted in the 7th Maine?

578 Ans. Yes, sir.

Cr.-int. 108. Were you again wounded?

Ans. Slightly; buckshot in the thigh.

Cr.-int. 109. Was it the occasion of your last wound that you went to the Portsmouth Grove Hospital?

Ans. No; I was sick with diarrhœa.

Cr.-int. 110. Were you brought to Portsmouth Grove from Norfolk?

Ans. No; from Washington.

Cr.-int. 111. When did you enter at Portsmouth Grove, about?

Ans. It was in July. I was there when the battle of Gettysburg came off. I can't give the dates. I was there till some time in the last of August—some six weeks in all.

Cr.-int. 112. I understood you to say yesterday that the bit of rubber you then produced from your pocket, and from which the fragment was cut and marked by the examiner "F. D." for identification, was like the rubber that you used, and saw Mr. Dunton use, in making the pencils with rubber in the end, as you have testified. Is that correct?

(Objected to as a wrong assumption of what is already matter of record, and can be referred to.)

Ans. That is not correct. I said it was something similar to that, but not equal to it. I generally have a piece of rubber in my pocket for use when I'm scribbling; but I didn't bring that rubber to produce it before the court.

Cr.-int. 113. In what respect was the rubber you did produce, and from which the fragment was cut, not equal to that used in making the pencils, as inquired of in the last question?

Ans. This is not so fine; this has a little grit in it—coarser. The old-fashioned rubber, such as we used to use, was pure rubber, like that used in making overshoes. This is like a composition of rubber and stuff.

579 Cr.-int. 114. Was the rubber you used to use like defendant's Exhibit B B, now shown to you? (Said exhibit here shown witness.)

Ans. Yes, sir; as near as I can recollect. This is pure rubber. Yes, sir; I should give it as my best judgment that that is fac simile to the rubber we used to use.

Cr.-int. 115. Who first spoke to you about testifying in this cause?

Ans. Mr. Thacher, the son to this gentleman here—Mr. Thacher, jr.

Cr.-int. 116. When was that?

Ans. When he was down East here, two weeks ago; a little more than that, I guess it is. I don't recollect; a short time since.

Cr.-int. 117. Was there anybody with him when he spoke to you about it?

Ans. Yes, sir.

Cr.-int. 118. Who?

Ans. Mr. Dunton just showed him up into my shop; just passed the time of day and went immediately out.

Cr.-int. 119. When did you first hear of a controversy in respect to these pencils with rubber in the end?

Ans. Mr. Thacher informed me; took down some notes of what I knew relative to it.

Cr.-int. 120. Have you ever spoken about your making such pencils, or having seen Mr. Dunton make them, prior to that time, to anybody?

Ans. No, sir, not here in Rockland—not since I left the West—not in this place at all.

Cr.-int. 121. How long before Mr. Thacher and Mr. Dunton called upon you together had you seen Mr. Dunton?

Ans. I hadn't seen him; didn't know he was round till he called with Mr. Thacher. That was the first knowledge I had of his being round.

Cr.-int. 122. When had you last seen him?

Ans. I do not recollect; it had been some time.

Cr.-int. 123. Had you seen him this summer?

Ans. No, sir; not to my knowledge. He might pass through
580 Rockland forty times and I not see him, as I hardly ever go out of my shop except to my meals. I had no knowledge of this suit till Mr. Thacher informed me of it, and he said it was very probable he should want to make use of me as an evidence. That's all I knew about it prior to Mr. Thacher's coming into my shop.

(Last part of this answer objected to by complainant as irresponsive.)

Cr.-int. 124. Did you see Mr. Dunton last spring?

Ans. If I did, I've forgotten it. I have no knowledge of it.

Cr.-int. 125. Did you see him last winter any time?

Ans. I did not.

Cr.-int. 126. Had you seen him at all, for ten years, till he came to call on you with young Mr. Thacher?

Ans. I think I have, and don't know that I have.

Cr.-int. 127. What did Mr. Thacher say when he called on you on this occasion?

Ans. Why, he questioned me whether I knew anything relative to Mr. Dunton's styluses and pencils with rubber in the end, and I told him same as I've told you all here.

Cr.-int. 128. Did he have any such pencils with him at the time?

Ans. No, sir; he didn't have anything. I provided him with pen and ink and he took down what I said.

Cr.int. 129. When did you next see Mr. Dunton after he left you with Mr. Thacher, as I have stated?

Ans. A short time afterward. I happened to be going to Lincolnville Centre on a visit, and he was down at Rockland. I was going down to the stable after a team, and he asked me to ride with him; said he'd carry me to my brother's in Lincolnville; which he did. He was going up there on business to see some men he wanted to get for evidences—Mr. Hogers, for one, and Mr. Fuller.

Cr.-int. 130. Did you go with him to see any of them?

Ans. No; I just sat in the wagon while he jumped out and conferred with them. I knew nothing of the conversation whatever that they had together.

Cr.-int. 131. Didn't you go with him to see your brother on that subject?

581 Ans. He had seen my brother before.

Cr.-int. 132. Did you not go with him to see your son?

Ans. I rode down with him the next day from my brother's; went round by the beach, that's five miles out of the way. Mr. Dunton hadn't seen my brother for years. I carried him into the shop and said he wanted to get some evidences. Mr. Dunton wanted to know if he remembered anything about his coming to Lincolnville in 1855. He thought a minute and said yes. Mr. Dunton said, it is possible we may want to use you as an evidence to prove that fact; we would just like you to have it in mind so that you may be able to tell the truth, and the whole truth.

(Latter part of answer objected to by complainant as irresponsive.)

Cr.-int. 133. Had Mr. Dunton passed the night at Lincolnville Centre?

Ans. No, sir; he came up the next day to see a man named Matthews, that resides in Belfast; the same that was here. I done what business I wanted to do with my brother, and got in and rode down with Mr. Dunton.

Cr.-int. 134. What time did he leave you the day before?

Ans. It's along in the afternoon. I forget what day it was. A shower came up.

Cr.-int. 135. Where did you see him the next day?

Ans. In Lincolnville Centre.

Cr.-int. 136. Whereabouts in Lincolnville Centre?

Ans. He stopped with a man by the name of Dunton, a cousin of his, that keeps a store.

Cr.-int. 137. After you had seen your son did you drive directly back to Rockland with Dunton?

Ans. No, sir.

Cr.-int. 138. Where did you go?

Ans. I walked down afoot as far as his house in Camden. He wanted I should go down with him and see some fine specimens that he had, and he being an old acquaintance, I went down with him out of courtesy, and stopped with him over night.

582 Cr.-int. 139. Did he accompany you on foot?

Ans. No, sir.

Cr.-int. 140. How did you and he get back to Camden?

Ans. Back from where?

Cr.-int. 141. From your son's?

Ans. We rode from Centre Lincolnville to the beach, and from the beach round to his house, then the next day I walked down to Rockland overland.

Cr.-int. 142. You say you have been a justice of the peace for Waldo County for over twenty years. Did you ever hear a case civil or criminal before you as justice during that time?

Ans. Quite a number.

Cr.-int. 143. Have you spoken to any of your sons in regard to Mr. Dunton making pencils with rubber in the end, except as you have mentioned at the beach, since the first of January last?

Ans. There was nothing mentioned at the beach about pencils. All was Mr. Dunton asked if he remembered his going through Lincolnville in 1855.

Cr.-int. 144. Have you ever spoken to either, and, if so, to which of your sons, in reference to Mr. Dunton's or yourself making or having said pencil with rubber in the end, since the first of January last?

Ans. No, sir.

Cr.-int. 145. Since you have been justice of the peace have you ever been taken before any magistrate as a prisoner?

Ans. Why, I've—not as a prisoner—yes, you can call it a prisoner. I was once arrested for making some loud talk on the Sabbath in reference to the clergy, and they put me in the lock-up, and next morning they liberated me. I'd just been to the Baptist church, and on the way home I stopped to make some comments to some gentlemen relative to the pastor's exposition of the Scriptures.

Cr.-int. 146. When was that?

Ans. That's some time ago. I disremember; since last spring.

583 Cr.-int. 147. Is that the only time you've been arrested and locked up since you have been a justice of the peace?

Ans. Well, a long time ago I got into a difficulty with a man down in Rockland, and they said I knocked him over, and they arrested us both and put us in the lock-up—that's when Mr. Farwell was judge of the police court. Next morning I was carried before the court, and he exonerated me on my proving that I did it in self-defence, and did not fine me. He fined the other man.

Cr.-int. 148. How long ago was that?

Ans. I disremember; some time ago. Judge Farwell was judge then. Mr. Hall is judge now, and has been this year or two.

Cr.-int. 149. Have you ever been arrested and in the lock-up on any other occasions than the two you have mentioned since you've been justice of the peace?

Ans. That's all that I know of.

Cr.-int. 150. Have you ever been convicted of a misdemeanor since you have been justice of the peace?

(Objected to by the defendant as not the proper evidence.)

Ans. No, sir.

Cr.-int. 151. Have you ever been fined for intoxication since you have been justice of the peace?

Ans. Yes; once.

Cr.-int. 152. When was that?

Ans. Well, some time five or six months ago. I went to an Irish wake down on the Point amongst the Irish, and suppose I drank more than I ought, being amongst pretty high company. The police came down and arrested all that were standing around. I didn't know before that a man could be forced into a court to say anything that would criminate himself.

Cr.-int. 153. Have you now stated all the times that you have been fined, encased, or locked up since you have been a justice of the peace?

Ans. Yes, sir.

584 Additional direct interrogatories by Mr. Washburne, and answers of the witness thereto:

Int. 36. Were the pencil-erasers, having lead in one end and rubber in the other and in the wood, which you made, like that one which you bought from said A. R. Dutton in the fall of 1856?

(Objected to as not rebutting, immaterial, and irrelevant, also as leading.)

Ans. They were as near alike as I could imitate.

Int. 37. Please look at defendant's Exhibit E, now shown you, and state how the said pencil-eraser, which you bought from A. R. Dunton in the fall of 1856, and those which you subsequently made like it, corresponded with this exhibit?

(Objected to as above, except "as leading.")

(The above exhibit shown witness.)

Ans. Well, very nigh. I used to cut in here, split up that, put in a little rubber, glue it back, and point it off. There would be pencil in

the other end. I would take the point of my knife and make a little groove larger than the lead—make the groove larger than where the lead was before, so I could insert the rubber. The pencil in the other end would need no alteration.

Int. 38. In your cross-examination you have stated that you gave some of said pencil-erasers, which you made, to your nephews, Frank and Israel Herrick, in Princeton, Illinois. Afterwards you were asked if you remembered positively any persons to whom you gave said pencil-erasers, and answered you did not. In that answer did you intend to include your said nephews?

(Same objection, also as leading.)

Ans. No, sir; I did not.

Int. 39. Were you subpœnaed to attend this examination here as a witness on the part of the defendant?

585 Ans. No, sir. My son is subpœnaed, and the officer, being in something of a hurry, asked him if it would make any difference if I would come without being subpœnaed, and he would subpœna me when I got here. He said it would make no difference—that I would come.

M. W. TOWER.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

CAMDEN, ME., *Sept.* 4, 1873.

(Plaintiff's counsel give notice on the record that they will move to strike out tha foregoing deposition, on the ground that it is not in rebuttal of the plaintiff's rebutting evidence, and on the further ground that, so far as the same relates to prior use or knowledge, the names of the persons making such prior use or having such prior knowledge, and the places where the same was made or used, have not been stated in the answer, in accordance with the statutes upon that subject.)

F. DODGE, *Examiner.*

CAMDEN, ME., *Sept.* 4, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of JULIA A. HARWOOD, taken on behalf of the defendant, at Camden, Maine, Sept. 4, 1873, before Frederic Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

586 Ans. Julia A. Harwood; Camden, Maine; wife of Lyman P. Harwood.

Int. 2. Do you know Alvin R. Dunton; and, if so, how long have you known him?

Ans. I do. I have known him six years.

Int. 3. Did you see said Dunton on any occasion last winter; and if so, what time in the winter, and where, and what occurred?

(Objected to as not rebutting, and immaterial and irrelevant.)

Ans. I saw him last winter, at our house, about the middle of February, on Sunday. He showed us a pencil, sharpened at both ends—lead in one end and rubber in the other. He said [any statements objected to as hearsay] that Mrs. Thomas found it for him in her private drawer; that he left it there in 1855 or 1856. He seemed very glad that he found it; said that he used it in his drawings; that if he made a line that didn't suit he could erase it,

Int. 4. What do you mean by "us?"

(Same objection.)

Ans. My husband and I. It looked like a pencil that had been used considerable.

Int. 5. Do you remember any marks or letters upon it?

(Same objection.)

Ans. I think there was some letters—the letter "K" on one side. I didn't notice them particularly. "K and Blunt," I think.

Int. 6. Would you recognize that pencil if you now saw it?

(Same objection.)

Ans. I think I should.

587 (Plaintiff's counsel requests defendant's counsel to allow the witness to pick it out from among the other exhibits. The defendant's exhibits B, C, D, E, G, H, I, K, L, M, N, O, P, B B, C C, D D, E E, F F, and G G are shown the witness, and she selects from them defendants Exhibit E.—F. DODGE, *Exr.*)

Int. 7. Is Exhibit E, now shown you, and which you have just selected from all defendant's exhibits, the pencil which said Dunton showed yourself and your husband on that occasion?

(Same objection and as leading.)

Ans. This is the pencil.

Int. 8. How long did said Dunton remain at your house on that Sunday afternoon?

(Same objection, and as assuming what the witness has not stated. Defendant's counsel directed the word "afternoon" to be erased.)

Ans. I couldn't tell exactly. He came in the forenoon, about 10 or 11 o'clock, and went away about 2. He took dinner with us, and said he was going away about 4, to take a chicken-dinner with Mrs. Thomas. When he left our house he went to Mr. Washington Dunton's—George W.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. How far is your husband's house from Mrs. Thomas'?

Ans. It isn't a great ways. I should think it isn't over half a mile, if it is that.

Cr.-int. 2. Upon what road is your husband's house situated?

Ans. On Cross street, corner of Cross and Central streets.

Cr.-int. 3. What church do you and your husband commonly attend?

Ans. The Universalist.

588 Cr.-int. 4. Did you go to church at any time on the day when Mr. Dunton was at your house?

Ans. We did not.

Cr.-int. 5. How do you fix the day of his call as Sunday?

Ans. I know, because my husband was at home on the forenoon, and he isn't generally at home at that time week-days.

Cr.-int. 6. How do you fix it as the middle of February?

Ans. Because Mr. Dunton had our sleigh the 18th of February to go to Hope, and that was Tuesday. This was the Sunday before.

Cr.-int. 7. How do you fix the 18th of February as the day he had your sleigh?

Ans. Because the evening of the 18th we went to a party, and he had the sleigh in the afternoon of that day.

Cr.-int. 8. How do you fix the 18th as the day of the party?

Ans. Because I have it down in my diary.

Cr.-int. 9. Have you the diary with you?

Ans. I have not.

Cr.-int. 10. When did you last refer to it for the purpose of fixing the date?

Ans. I should think it was about two weeks ago.

Cr.-int. 11. You have the diary still in your possession at home?

Ans. I have.

Cr.-int. 12. What time did Mr. Dunton get back the night of the party?

Ans. I don't remember; some time in the afternoon, I think.

Cr.-int. 13. Was there anybody else present besides yourself and your husband during Mr. Dunton's call?

Ans. There was a young lady boarding with us. She was out in the other room when he exhibited the pencil, but was there when we took dinner.

Cr. int. 14. How soon after Mr. Dunton arrived did he exhibit the pencil?

589 Ans. I don't remember exactly; it wasn't but a short time.

Cr.-int. 15. What did he first say?

Ans. He said that he had been up to Mrs. Thomas', and she found the pencil he left there. He gave a description of its use, and explained how he used it?

Cr.-int. 16. Did he state why he was glad he found it?

Ans. Yes, he told; but I don't remember what he said. He said he had been wanting to find it for some time, and was very glad she found it for him.

Cr.-int. 17. Did he state anything about a patent affecting it, or a suit going on concerning it, and say that he was glad to find it on that account?

Ans. He spoke of a suit going on against it. I don't remember his saying he was glad on that account—in those words.

Cr.-int. 18. Did he hand the pencil to you or your husband?

Ans. He handed it to my husband.

Cr.-int. 19. Didn't you have it in your hand?

Ans. I did not.

Cr.-int. 20. How did you see the letters on it?

Ans. When they held it in their hands, I went and bent down and looked at it while they were talking about it.

Cr.-int. 21. Did they turn it round?

Ans. I think they did. They examined it very closely.

Cr.-int. 22. How did you come to remember the letters "K" and "Blunt" as being on the pencil and not remember the other letters? Was there anything especial to call your attention to those letters rather than the others?

Ans. I heard them talking about it. I heard Mr. Dunton say there was "Herrick and Blunt" there once, and in sharpening the pencil he cut the letters all off but that "K and Blunt."

Cr.-int. 23. Did he say anything about that being a very old firm, that had not made pencils for a great many years?

Ans. I don't remember.

590 Cr.-int. 24. Did he say anything about the pencil being a very old pencil, or looking like a very old pencil?

Ans. He did.

Cr. int. 25. What did he say?

Ans. Said he had used them as long as 1852—been in his use.

Cr.-int. 26. When did you next see Mr. Dunton after this visit?

Ans. I think it was in April. I saw him when he came after the sleigh.

Cr.-int. 27. When you saw him in April, did he say anything about the pencil?

Ans. I don't remember.

Cr.-int. 28. When did you see him after you saw him in April?

Ans. I don't remember that.

Cr.-int. 29. When did you last see Mr. Dunton?

Ans. Last Tuesday.

Cr.-int. 30. When did you last see him before that?

Ans. Some time the last of August. I don't remember.

Cr.-int. 31. When did you last see him before that?

Ans. I think it was the first day of August, he staid at our house over night.

Cr.-int. 32. When did you last see him before that?

Ans. I don't remember.

Cr.-int. 33. How many times, to the best of your recollection, have you seen Mr. Dunton since he was at your house in the middle of February?

Ans. I couldn't say as to that—I've seen him a great many times.

Cr.-int. 34. On any of those occasions, has he talked to you or said anything in your presence concerning his finding the pencil at Mrs. Thomas', or about a patent suit or controversy going on concerning it, or about any matter or thing concerning which you have testified here to-day?

Ans. Yes, he has.

Cr.-int. 35. On which of those occasions?

Ans. He has spoken of it once or twice.

591 Cr.-int. 36. What did he say the first time he spoke of it?

Ans. He and my husband were talking—I couldn't remember what was said.

Cr.-int. 37. Can you remember nothing that was said except on this Sunday?

Ans. Nothing in particular.

Cr.-int. 38. Can you remember anything at all?

Ans. I don't know as I do.

Cr.-int. 39. You must know whether you remember or do not remember. Do you say that you do not remember anything whatever that took place or was said at any of the interviews between yourself and Mr. Dunton concerning the pencil and the matters inquired of in the 34th cr.-int., except the interview that took place on Sunday, as you state, in the middle of February?

(Objected to as assuming what she had not testified to.)

Ans. I heard him and my husband talking, but couldn't remember, to tell, anything that was said. The conversation was not directed to me.

(Complainant here requests the magistrate to certify that the defendant's counsel said in the hearing of the witness: "That's right; she said that the interviews were with her husband, not with her;" and that after such statement the witness added the last clause of her above answer. The magistrate does not so certify. But he certifies that he

heard Mr. Washburn say "That's right," and something else, all of which he did not catch—the witness immediately after the words "That's right" beginning the said last clause of her answer, to which he gave his attention, and which he immediately wrote down.)

Cr.-int. 40. Have you now stated everything that you can remember that has ever been stated in your presence, at any interview at which you and Mr. Dunton were present at the same time, respecting
592 this pencil, Exhibit E, or Mr. Dunton's finding the same, or his use of similar pencils, or any matter or thing testified to by you to-day?

Ans. I have.

Cr.-int. 41. When was it, if at any time, that you saw Mr. Dunton explaining the way he used such pencils to your husband?

Ans. On Sunday, in the middle of February. I think I saw him once after doing so.

Cr.-int. 42. Are either you or your husband a relative of Mr. Dunton's?

Ans. My husband is his cousin.

Additional direct interrogatories by John S. Washburn, esq., and answers of witness thereto:

Int. 9. Have you ever seen that pencil, Exhibit E, from the time Dunton showed it to you and your husband on that Sunday in February until the time when you identified it here to-day?

Ans. I never have.

JULIA A. HARWOOD,

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

CAMDEN, ME., *Sept.* 4, 1873.

593 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of L. P. HARWOOD, taken on behalf of defendant, at Camden, Maine, September 4th, 1873, before Fred'c Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. L. P. Harwood, blacksmith, Camden, Maine.

Int. 2. Are you acquainted with Alvin R. Dunton? If so, how long have you known him?

Ans. Probably I've known him thirty years or more.

Int. 3. He is a cousin of yours, is he not?

Ans. I suppose he is. His father was half-brother to my mother.

Int. 4. Do you remember seeing said Dunton on any occasion last winter; and, if so, when, where, and state what occurred.

Ans. I saw him at my house about the middle of February—my house in Camden, the 16th of February. He had a pencil there that he showed me that he got over to Mrs. Thomas'. He said it was one he left there, he thought, in 1855 or 1856. Well, he showed me the pencil; showed me how he used it.

Int. 5. Describe that pencil which he showed you.

Ans. It was an oldish-looking pencil, with rubber in one end and lead in the other.

Int. 6. Do you remember any letters or words that were upon it; and, if so, what?

594 Ans. On one side there was "K and Blunt." On the other side there was "Rhodes and Sons."

Int. 7. Would you recognize that pencil if you were to see it now?

Ans. I should.

Int. 8. Please examine defendant's exhibits now before you and state if you find that pencil among them; and, if so, point it out.

(Complainant's counsel requests the magistrate to certify that before asking the last question, and in presence of the witness, said defendant's counsel took Exhibit E from among the defendant's exhibits, looked at it, and laid it back on top of the pile of exhibits.

Counsel for defendant states that the implied imputation made upon him by counsel for complainant is ungenerous, unprofessional, and substantially without foundation; that as counsel for defendant was about to ask the preceding question counsel for complainant took up all defendant's exhibits from the table, handled them over, and laid them back upon the table; that after laying them back he had several pencils in his hand which he now has still; and defendant's counsel passed between the witness and the table whereon the exhibits were lying, and, standing in such a position that it would be difficult for the witness to see what he was doing, examined the exhibits lying together to ascertain if they had all been replaced by counsel for complainant, and did not, as counsel for complainant has asserted, change the position of any one of the exhibits. Counsel for defendant requests the magistrate to certify to the above facts.

The magistrate certifies as follows:

"That, while writing down the preceding question, but without raising his eyes from the paper, he noticed Mr. Wetmore, who was sitting at the same table, and on his right, handling the exhibits, which were in the centre of the table; that Mr. Washburn, immediately after,

595 came up to the table, opposite Mr. Wetmore, and touched or moved the exhibits; but the magistrate is unable to certify, for he does not know, and did not see, whether or not Mr. Washburn touched or took up any particular exhibit, or what he did with it if he so touched or took it up; and while so handling said exhibits, Mr. Washburn was standing in such a position in rélation to the witness as, to the best of the magistrate's judgment, would render it difficult for the witness to see what, if anything, Mr. Washburn did to the exhibits."

Defendant's Exhibits B, C, D, E, G, H, I, K, L, M, N, O, P, BB, CC, DD, EE, FF, and GG, are here shown the witness, and he selects Exhibit E.)

Ans. This is the pencil.

Int. 9. Have you seen that pencil before since that Sunday in February last?

(Objected to as assuming what witness has not stated.)

Ans. I have not.

Int. 10. Did Mr. Dunton state, on the occasion when he showed you that pencil, by whom it was made; if so, what did he say?

(Objected to as hearsay.)

Ans. He did not.

Int. 11. Did he state where Mrs. Thomas found it; if so, what did he say?

(Objected to as hearsay and leading.)

Ans. Said she found it in her private drawer, I believe, in her room where she slept.

Int. 12. How do you fix that time as being the 16th of February last?

Ans. By his having my sleigh the 18th to go to Hope.

Int. 13. How long was that visit of Mr. Dunton's on that Sunday?

Ans. He came into my house about eleven o'clock and left about two o'clock. He dined with us.

596 Int. 14. Where did he go when he left you?

Ans. Said he was going to his brother's—Washington's.

Cross-interrogatories by D. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. Did you have the pencil in your hand during Mr. Dunton's call?

Ans. I did.

Cr.-int. 2. When he took dinner and went away, did he say he was going to Mrs. Thomas' to take a chicken dinner that afternoon at four o'clock?

Ans. He spoke of that while he was there—not directly while he was going away.

Cr.-int. 3. Can you remember anything else that he said?

Ans. Yes; he said he wanted to go to Hope the next day, if he could, and that he was very glad he found that pencil.

Cr.-int. 4. Do you remember anything else?

Ans. Yes; he said he should like to go to Appleton, if he could, but he didn't know how he could go. Thought probably he might find some more pencils up there, if he went to Appleton with Mr. Gushee. Nothing else in particular that I remember now.

Cr.-int. 5. Was he at your house Monday?

Ans. He was not.

Cr.-int. 6. What time did he call there Tuesday?

Ans. I don't know. I didn't see him at my house Tuesday.

Cr.-int. 7. Did he tell you there was a patent suit which the pencil had some relation to?

Ans. He did.

Cr.-int. 8. Was that on his visit on Sunday?

Ans. Yes.

Cr.-int. 9. When I asked you if you didn't remember his stating anything else besides what you had already mentioned on that visit, did you not remember what you have just said about the patent suit?

Ans. I didn't remember it just then.

597 Cr.-int. 10. Have you seen Mr. Dunton frequently since his call upon you last February?

Ans. Several times.

Cr.-int. 11. Where?

Ans. At my shop in Camden.

Cr.-int. 12. Any other place?

Ans. Seen him at my house.

Cr.-int. 13. Talked with him about this case?

Ans. Yes.

Cr.-int. 14. What did he say?

Ans. Said it was putting him to a good deal of trouble looking up evidences.

Cr.-int. 15. Did he tell you what interest he had in it?

Ans. No, sir.

Cr.-int. 16. Do you fix the date of the 18th of February because you or your wife went to a party on that day?

Ans. That was the day that he had my sleigh, that we went to the party.

Cr.-int. 17. How do you fix the 18th as the day that he had the sleigh and you went to the party?

Ans. My wife put it in her diary.

Cr.-int. 18. Did you see the entry there?

Ans. I did.

Cr.-int. 19. When?

Ans. Yesterday.

Cr.-int. 20. Was that the first time that you ever looked at that entry?

Ans. I don't remember of seeing it before yesterday.

Cr.-int. 21. Who showed it to you?

Ans. My wife.

Cr.-int. 22. How did she come to show it to you?

Ans. We were speaking about going to the party.

Cr.-int. 23. Were you speaking about going to the party with reference to fixing the date of Dunton's visit?

Ans. Yes.

Cr.-int. 24. Then you have talked with your wife, have you, in reference to the testimony you and she were to be called upon to give in this case?

Ans. Yes.

L. P. HARWOOD

Sworn and subscribed to before me.

F. DODGE,
Notary Public.

CAMDEN, ME., *Sept.* 4, 1873.

598 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of FRANCIS M. TOWER, taken on behalf of the defendant, at Camden, Me., Sept. 5, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. Francis M. Tower; boot and shoe maker by trade; Rockland, Maine.

Int. 2. Do you know either of the parties to this suit?

Ans. I do not.

Int. 3. Are you acquainted with Alvin R. Dunton; and, if so, how long have you known him?

Ans. Well, I've not been personally acquainted with him till 1855—the first time that I had any talk with him. I've known him by reputation and sight before then.

Int. 4. Where did you see him in 1855, and what occurred?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. I saw him, I think it was in November, it was considerable cold.

I saw him drive to the hotel—the California House at Lincolnville Centre. Father says—we used to work right opposite to the hotel—(any statement by the father objected to, as hearsay)—Alvin R. Dun-
599 ton was out there, and he went out to see him, and he stopped there some few minutes. I was then thirteen years of age, and Mr. Matthews and Mr. Fuller were there. Mr. Matthews asked him to go home and stop with him over night—(objected to as hearsay.) He refused to do so, because it was so cold; he said he should return back to Camden.

(Objected to as hearsay.)

Int. 5. Was any one with him at the time?

(Same objection as to int. 4.)

Ans. He had a lady with him.

Int. 6. Who kept that hotel at that time?

(Same objection.)

Ans. Lancaster.

Int. 7. How do you fix November, 1855, as that time?

(Same objection.)

Ans. In 1854 I worked here in Rockland for Mr. Jackson. I was then twelve years of age. In 1855 I went to work for my uncle, John C. Tower, in Lincolnville, opposite the hotel, in a building now occupied by Mr. Matthews—J. Matthews—I won't say what his middle name is. Well, I worked for my uncle through 1855, and in Rockland for Mr. Jackson in 1854. In 1856 I went to work, the 26th of April, for Mr. John French. I was then fifteen years old. I worked for him a year, in the first place, then I worked for him six months longer; then I worked for one James Mahoney, helped run a coal-pit, helped burn 900 bushels of coal.

Int. 8. And it was the time you worked for your uncle in 1855, opposite the hotel, that you saw Mr. Dunton, as you have stated?

(Same objection, and as leading.)

Ans. Yes, sir.

Int. 9. You are the son of Martin W. Tower, are you not?

600 (Same objection.)

Ans. I am, sir.

Int. 10. Have you ever seen a pencil having rubber in one end in the wood and lead in the other end in the wood; and, if so, when and where?

(Same objection as to 7th.)

Ans. I have; in the town of Lincolnville. I think it was in 1856; very positive that it was.

Int. 11. Who had it?

(Same objection.)

Ans. My father.

Int. 12. Where did he get it?

(Same objection.)

Ans. He told me that he got it of Mr. Dunton in Rockland.

(Objected to as hearsay.)

Int. 13. What, if anything, did he do with it, if he used it at all?

(Same objection.)

Ans. He used to use it sometimes in writing cards. It was a very homely pencil. He told me that this rubber that was inserted in the end was, if he made any letters, so as to rub out and equalize those letters.

(Ans. objected to as hearsay.)

Int. 14. Did you see him so use that pencil-eraser?

(Same objection.)
Ans. I did.
Int. 15. Did you ever see him have and use any other pencil-erasers made in the same way?
(Same objection.)
601 Ans. I never did.
Int. 16. Did you go West with your father?
(Same objection.)
Ans. I did not.
Int. 17. Where were you employed when your father went West?
(Same objection.)
Ans. I was at home, in Lincolnville Centre.
Int. 18. For whom were you at work at that time?
(Same objection.)
Ans. I was not at work for any one at that time.
Int. 19. For whom had you last before worked?
(Same objection.)
Ans. I had worked for John C. Tower, my uncle.
Int. 20. When did your father go West?
(Same objection.)
Ans. He went April 12th, 1857. I was then fifteen years old.
Int. 21. Was that after you had finished working for John French?
(Same objection.)
Ans. No, sir; that's the year I went to work for him.
Int. 22. I understood you to state that you worked for your uncle in 1855, and until some time in the spring of 1856, and then went to work for John French for a year and then six months. Please explain.
(Same objection.)
Ans. I went to work for John French in 1857, the 26th of April. That's what I said.
Int. 23. And up to that time, then, you had worked for your uncle?
(Objected to as leading, and same objection.)
602 Ans. I had.

Cross-interrogatories proposed de bene on behalf of complainant by E. Wetmore, esq., and answers of witness thereto.

Cr.-int. 1. What is your age?
Ans. My age is 31 the 6th day of March.
Cr.-int. 2. How long was your father absent at Rockland when you say he there got the pencil from Mr. Dunton?
Ans. He went in the spring, and in the fall I see the pencil; spring of 1856; in the fall I see him using the pencil at home, at Lincolnville Centre, marking cards Sunday.
Cr.-int. 3. What time in the fall?
Ans. Well, I couldn't give any correct answer as to the day or the week, but I think it was in October.
Cr.-int. 4. Did anybody else work with you at your uncle John C. Tower's in 1855?
Ans. My brother and my father—brother Martin Van B.—worked with me for some time.
Cr.-int. 5. Did they continue to work there as long as you did?
Ans. They worked there till they went West.
Cr.-int. 6. Where was the shop situated in relation to the hotel?
Ans. It was—there is one question I would like to ask. Do you mean from 1855 to 1857?
Cr.-int. 7. (Cr.-int. 5 repeated.)

Ans. In 1855? I was going to ask a question. He worked till 1856 in the shop, then he came to Rockland and worked till the winter following—I mean my father—and in the fall of 1856 he came home. He worked there till 1857, then the 12th day of April he went West.

Cr.-int. 8. (Cr.-int. 6 repeated.)

Ans. It was situated about—as near a description as I can give of it—about northwest from the hotel, as you turn to go to Belfast; the shop is right across the road from the corner of the hotel; was at that time. Owned by Dr. Gordon.

603 Cr-int. 9. Did your uncle occupy the same shop?

Ans. He did at that year. I worked for him years and years; all the time I was a small boy. He occupied a shop over where Mr. Robertson traded now at Lincolnville corner, and he worked at my uncle's shop, Mr. Warner Tower.

Cr-int. 10. What moves did your uncle John C. Tower make while you worked for him?

Ans. When he moved, he went from the shop over Robertson's store to Mr. Gordon's store, and after I came back from Mr. French's he was in my uncle's shop, Warner C.

Cr-int. 11. Did he make that move while you were working for Mr. French?

Ans. He did.

Cr-int. 12. What other implements, if any, did you see your father use in drawing cards in the fall of 1856 other than the pencil you have mentioned?

Ans. I did not see him use any. He had that pencil, and I asked him where he got it, and he said he got it of Dunton. It was a very homely pencil, I call it; had lead in one end and rubber in the other; he said he used it when he made a mark too large, to rub it out. I was not at home much, though, that fall, and did not see him use it a great many times.

Cross-int. 13. Why were you not at home?

Ans. I was at work for Mr. Moore in Searsmont, considerable that fall, and I staid at his house while working for him.

Cr-int. 14. When was your attention first called to the fact that you saw your father use the pencil in the fall of 1856?

Ans. I couldn't tell exactly the day of the week or what week it was; it was some time between September and November. I never put down the day or date in my mind; it was something I'd never seen before, and I asked him where he got it, and he told me; that's all.

Cr-int. 15. When did you first tell any person that you saw your father use such a pencil in 1856?

604 Ans. I don't remember of telling any one anything about it, as I told you before. I tell you I don't remember any date about it, any particular time. It was between September and November, 1856.

Cr-int. 16. Have you told no person, before you came to testify here, that you saw your father use such a pencil in 1856?

Ans. I think I have; suppose I did.

Cr-int. 17. Who was the first person you told?

Ans. I know no names. I don't know any one in this town to call by name.

Cr-int. 18. When did you first tell anybody?

Ans. If I have told anybody it's since I came up here; since Tuesday.

Cr-int. 19. Have you previously made a written statement?
Ans. No, sir.
Cr-int. 20. How did you come to come here Tuesday?
Ans. I was summoned here.
Cr-int. 21. Had any one spoken to you about coming here before you were summoned?
Ans. No, sir. I didn't know a word about it.
Cr-int. 22. Where have you been living the last eight months?
Ans. I've been living in Rockland, sir.
Cr-int. 23. Have you been living with your father in Rockland?
Ans. No; I am not.
Cr-int. 24. Have you seen your father during those eight months?
Ans. Yes, sir.
Cr-int. 25. How often have you seen your father during those eight months?
Ans. Every day.
Cr-int. 25. Do you work in the same shop with him?
Ans. Yes, sir; he works with me.
Cr-int. 27. Do you remember Mr. Dunton and young Mr. Thacher calling to see your father some time ago, within the past six months, at the shop in Rockland?
Ans. I do.
605 Cr.-int. 28. Were you present when your father made a statement which Mr. Thacher took down?
Ans. He made some statements; I don't know what they were; I couldn't tell; I was about my work.
Cr.-int. 29. You didn't speak about the pencil then, did you?
Ans. I did—or they did, rather.
Cr.-int. 30. Have you seen Mr. Dunton since that time?
Ans. I have.
Cr.-int. 31. Have you spoken about seeing the pencil with him?
Ans. No, sir.
Cr.-int. 32. You have never spoken about the pencil to him, nor he to you?
Ans. He has not, nor I to him.
Cr.-int. 33. Have you seen him here every day since you have been waiting here to testify?
Ans. I have not.
Cr.-int. 34. Did you not see him yesterday?
Ans. I did.
Cr.-int. 35. And the day before?
Ans. I did.

F. M. TOWER.

Sworn to and subscribed before me.

F. DODGE,
Examiner.

CAMDEN, ME., *Sept. 5th*, 1873.

(Same notice as to striking out given by complainant as in deposition of Martin W. Tower.)

606 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of ELIZABETH B. DUNTON, taken on behalf of the defendant, at Camden, Maine, Sept. 5, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. Elizabeth B. Dunton; Camden, Maine.

Int. 2. What is your husband's name?

Ans. George Washington Dunton.

Int. 3. Is he the brother of Alvin R. Dunton?

Ans. He is.

Int. 4. How long have you been acquainted with Alvin R. Dunton?

Ans. Ever since I was born, I might say; he lived in the place where I did—in Hope; he was born in Hope, I think.

Int. 5. Did you see Alvin R. Dunton at any time last winter; and, if so, when, where, and state what occurred?

Ans. He was at my house in Camden; came there Sunday, just after it was dark, I think, just after tea, and brought a pencil, and my husband took it and looked at it. I don't recollect taking it in my hands, but I went and looked at it. He said he found it at Mrs. Thomas'. He said he never went there after anything but what he always found it; that it was the same one he had in 1855, when he and his wife were there. I don't know of anything more.

607 Int. 6. What time in February last was this?

(Objected to as leading.)

Ans. I didn't state the time. I don't know exactly the day.

(Question withdrawn.)

Int. 7. What time last winter was the Sunday when this occurred?

Ans. I couldn't tell you.

Int. 8. State, as nearly as you can, what month it was?

Ans. Well, I'm sure I can't; I don't wish to, as I might make a mistake. I didn't set it down, or I might tell you.

Int. 9. Do you know where said Dunton had been previously to that Sunday? and, if so, state.

Ans. He had been to Mr. Lyman Harwood's, for one place; he spoke of that.

(Objected to as hearsay.)

Int. 10. Please describe that pencil which he showed you and your husband on that Sunday, last winter.

Ans. It was pointed, with a little rubber in one end and a letter K on it. I didn't take it in my hands, but I stood and looked at it.

Int. 11. Have you ever seen it since that time?

Ans. No.

Int. 12. Do you think you would recognize it again if you saw it now?

Ans. I might and I might not; shouldn't say positive that I would.

Int. 13. Please examine defendant's exhibits, now shown you by the magistrate, and state if you find that pencil among them, and designate it.

(Exhibits shown witness, as in depositions of Mr. and Mrs. Harwood above.)

Ans. (Defendant's Exhibit I selected by witness.) Seems to me that looks like it.

608 Int. 14. Do you find upon that Exhibit I the letter K, which you say you remember seeing upon the pencil which said Dunton so showed you?

Ans. I'll take that back. They said it had a letter K, but I didn't examine it—didn't take it in my hands—didn't see the letter.

Int. 15. Do you remember the time of A. R. Dunton's second marriage; and, if so, when first after it did you see him, and where?

Ans. At my house; stopped over night; in October, 1855.

(Objected to as not rebutting, immaterial, and irrelevant.)

Int. 16. Was any one, and, if so, who, with him?

(Same objection.)

Ans. His wife.

Int. 17. Had you known her at any time before; and, if so, what was her name before she was married?

(Same objection.)

Ans. Laura Pendleton. I was a near neighbor to her. Knew her when she was a baby.

Int. 18. Did you see A. R. Dunton and his wife at any other place, in the fall of 1855, besides at your house, where they stayed over night? If so, state where.

(Same objection.)

Ans. To Mrs. Caleb Thomas'—Rachel B. Thomas'. I was there. My husband was with me there.

Int. 19. Was that before or after they staid over night at your house?

(Same objection.)

Ans. It was afterwards that I was up there, I think.

Int. 20. Was Mr. Dunton—A. R. Dunton—at Mrs. Thomas' when you first got there that night?

(Same objection.)

609 Ans. He was not.

Int. 21. How long after you got there did he come; and from where?

(Same objection.)

Ans. But a short time. He came from Belfast.

Int. 22. Did his wife come with him?

(Same objection.)

Ans. His wife was there, at Mrs. Thomas'.

Int. 23. Do you remember anything that occurred with reference to A. R. Dunton the night he and his wife staid at your house?

(Same objection.)

Ans. He was taken sick and I made him some tea.

Int. 24. How long, if you know, were Mr. and Mrs. A. R. Dunton staying at Mrs. Rachel B. Thomas' house that fall of 1855?

(Objected to as leading, and same objection.)

Ans. I couldn't recollect the length of time. She was there quite a little spell. She called at my house several times.

Int. 25. How do you fix the fall of 1855 as the time when you saw A. R. Dunton and his wife at Mrs. Thomas' and they staid over night at your house?

(Same objection.)

Ans. It was the first year I lived here in Camden, and my youngest daughter was born that same year.

Int. 26. Did you ever see a lead-pencil having rubber in one end before that Sunday last winter you have mentioned; and, if so, when and where?

(Same objection.)

Ans. I have, in my own house, in 1855, and before that time, I think.

610 Int. 27. Who had them?

(Same objection.)

Ans. My husband.

Int. 28. Anybody else?

(Same objection.)

Ans. I don't remember anybody.

Int. 29. Where did your husband get them, if you know?

(Same objection.)

Ans. He used to make them himself, and A. R. had them—A. R. Dunton.

Int. 30. Did you see A. R. Dunton use them; and, if so, how and when?

(Same objection.)

Ans. Up at Mrs. Thomas', the night after he came from Belfast, in 1855.

Int. 31. Do you know who made the lead-pencil with rubber in one end which A. R. Dunton showed you and your husband on the Sunday last winter?

(Same objection.)

Ans. He used to make them—A. R. Dunton.

Int. 32. How do you know?

(Same objection.)

Ans. I heard him say.

Cross-interrogatories proposed de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Was the visit you have described of A. R. Dunton and his wife to Camden the first visit he made with his wife after his second marriage, namely, Laura Pendleton?

Ans. It was.

611 Cr.-int. 2. Will you swear positively that it was in the year 1855?

Ans. I will.

Cr.-int. 3. You are as sure of that as you are of anything that you have testified to?

Ans. I be.

Cr.-int. 4. How far is your house from Mr. L. P. Harwood's?

Ans. That I couldn't tell you; I never measured the length.

Cr.-int. 5. Tell me, as near as you can?

Ans. I never went from my house there.

Cr.-int. 7. Can you not say whether it is more or less than a mile?

Ans. It is less than a mile, I think.

Cr.-int. 7. Do you think it's more than half a mile?

Ans. I should not.

Cr.-int. 8. Where have you been living since the 18th of January last?

Ans. In my own house, in Camden, opposite the factory; have lived there since 1855. We came there June 18th, I think it was.

ELIZZI B. DUNTON.

(Complainants give notice that they will move to strike out the depo-

sition of this witness from direct int. 26 through the direct examination, as relating to prior knowledge and use not set up in the answer.)

Sworn to and subscribed before me.

F. DODGE,
Examiner.

CAMDEN, *Me.*, *Sept.* 5, 1873.

612 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of GEO. WASHINGTON DUNTON, taken on behalf of the defendant, at Camden, Maine, Sept. 5, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. George Washington Dunton, Camden, Me.; in the shoe business; cobbling most of the time.

Int. 2. Are you a brother of Alvin R. Dunton?

Ans. I am. That's what they tell me.

Int. 3. Did you see said Alvin R. Dunton at any time last winter; and, if so, when, where, and what occurred?

Ans. I saw him the first time at my shop, in Camden. That was—I don't know as I recollect exactly the date; in the middle of the month, I should think—February. I don't recollect what day of the week it was. My memory is rather poor on such things. Well, he seemed to be very anxious about finding a pencil—a pencil with rubber in one end and lead in the other. Told him—he wanted me to look among my old pencils—that I left 'em all at home and went off to California, and hadn't seen 'em since. Said if he didn't find one somewhere round here he was going up to Mrs. Thomas' to see if he could find one there. He should go to Lincolnville and Appleton to see if he could find Maxcy R. Gushee, as he let him have a pencil of that kind he remem-
613 bered of. Next day was Sunday. He came down to my house with a pencil; said he'd found one. He appeared to be very pleased. Well, he took it out and showed it; said he'd been to Lyman Harwood's; come from there. Said he found the pencil at Mrs. Thomas'; that he never called for anything there that she knew of but what she'd hunt it up. I don't know that there was anything more said concerning the pencil.

(Objected to as hearsay.)

Int. 4. Did he say where or how that pencil was found at Mrs. Thomas'?

(Objected to as hearsay.)

Ans. Said she found it in her trinket-box; a private box she had.

Int. 5. Did he say who made it, or when it was made, or how long it had been there; and, if so, state what he said?

(Same objection.)

Ans. Said he must have left it there in 1855 or 1856—one of his own getting up—the rubber end.

Int. 6. Describe that pencil with rubber in one end and lead in the other, which he showed you.

Ans. Well, it's a common pencil; lead, I guess, run clear through it, first place; sharpened at both ends; pencil appeared to be used considerable, had been. One end seemed to be whittled up pretty near a "K," I noticed, that he showed me.

Int. 7. Did you notice any other letters or words on the pencil; and, if so, what?

Ans. There was writing on the other side of it; that was a New York firm, I believe. I don't remember the name—Blunt, I think; their names were on the side that was whittled, where the "K" was.

Int. 8. Have you seen that pencil since that time?

Ans. No, sir.

Int. 9. Do you think you would recognize it if you saw it now?

614 Ans. I guess I should; couldn't say positive.

Int. 10. Please examine defendant's exhibits, which the magistrate will now show you, and state if that pencil is among them; and, if so, designate it.

(Same exhibits shown witness as shown to Mr. and Mrs. Harwood and to Mrs. Dunton above.)

Ans. Well, I should say that looked the most like it of anything I can find, according to my recollection. I couldn't swear to it, not particular. [Defendant's Exhibit E selected by the witness.]

Int. 11. Do your remember your brother A. R. Dunton's being married to his second wife? If so, when did you first see them after that, and where?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. Heard of it just after I moved to this place. I saw them in the fall at Mrs. Thomas'—fall of 1855 that same year. Don't recollect Mrs. Thomas' first name—Rachel B.; that's it.

Int. 12. Did you see them anywhere else than at Mrs. Rachel B. Thomas' that fall?

(Same objection.)

Ans. At our house.

Int. 13. How long were they at your house?

(Same objection.)

Ans. One night.

Int. 14. How long were they at Mrs. Rachel B. Thomas' that fall of 1855?

(Same objection.)

Ans. I could't tell; it was a week or so.

Int. 15. What was the name of his wife, if you know, before she was married?

615 (Same objection.)

Ans. Laura Pendleton.

Int. 16. Had you known her previously?

(Same objection.)

Ans. She lived right abreast of our house for years. Held her in my arms many a time. A few months older than my oldest daughter.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. Was the visit of A. R. Dunton and his wife to Camden, which you have stated occurred in the fall of 1855, the first visit made by A. R. Dunton with his wife to Camden after his second marriage?

Ans. First I ever knew anything about.

Additional direct interrogatories by John S. Washburn, esq., and answers of the witness thereto:

Int. 17. How do you fix the year 1855 as the year in the fall of which A. R. Dunton and his wife were in Camden, as you have testified?
(Objected to as new matter, not called out by the cross-examination.)
Ans. By a deed that I took that year, and a little child—baby.
Int. 18. What deed and what child?
(Same objection.)
Ans. Deed of my house in Camden. My own child Lily.

GEO. W. DUNTON.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

CAMDEN, ME., *Sept.* 5, 1873.

616 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of ERMINA G. DUNTON, taken on behalf of the defendant, at Camden, Me., Sept. 5, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name and residence.
Ans. Ermina G. Dunton, Camden, Maine.
Int. 2. What was your husband's name?
Ans. John B. Dunton. He is not now living. He was the brother of Alvin R. Dunton.
Int. 3. Did you know of the second marriage of said Alvin R. Dunton; and, if so, when did you first see him after it and where?
(Objected to as not rebutting, immaterial, and irrelevant.)
Ans. Not when he was married. I don't know as I could tell at what time he was married. I saw him at his father's house, in Hope, Maine, 1855.
Int. 4. What time in 1855, as nearly as you can state?
(Same objection.)
Ans. Well, I should think it was either the last of October or some time about the first of November.

617 Cross-interrogatories proposed de bene by E. Wetmore, esq., and answers of witness thereto:

Cr.-int. 1. How do you fix the date as 1855?
Ans. It was soon after I had lost a sister.
Cr.-int. 2. Is that the only way?
Ans. And just one year before I was married.
Cr.-int. 3. Was his wife with him on the occasion you refer to?
Ans. She was not.
Cr.-int. 4. Have you ever seen her since his marriage?
Ans. Yes, a number of times.
Cr.-int. 5. How long was he at Hope?
Ans. But a short time. I don't think I saw him over fifteen minutes myself.
Cr.-int. 6. What was he doing?

Ans. Merely standing and talking when I saw him. He didn't stop to sit down.

Cr.-int. 7. Do you know where he came from?

Ans. I do not.

Cr.-int. 8. Do you know where he was going to?

Ans. I do not.

Cr.-int. 9. Do you know whether he remained in Hope more than one day?

Ans. He remained there but a short time; not over an hour.

Cr.-int. 10. Have you ever seen him there since?

Ans. Yes, a great number of times.

Cr.-int. 11. Had you seen him there before?

Ans. Don't think I ever did.

Cr.-int. 12. How long have you lived in Camden?

Ans. Nearly five years.

Cr.-int. 13. What is the distance between Hope and Camden—about?

Ans. Six miles.

Additional direct-interrogatories by J. S. Washburn, esq., and answers of witness thereto:

Int. 5. When did you first see A. R. Dunton with his wife after the time you saw him at Hope, in 1855?

618 Ans. In the fall of 1856.

Int. 6. Where?

Ans. At the same place—at his father's house.

Int. 7. What time in 1856?

Ans. Well, about September or October; I don't just remember which.

Additional cross-interrogatories by Mr. Wetmore, and answers of witness thereto:

Cr.-int. 14. What were they doing there?

Ans. Visiting.

Cr.-int. 15. How long were they there?

Ans. I think two nights. I'm not positive as they were there more than, I think, two.

Cr.-int. 16. Do you know where they went from then?

Ans. I couldn't say positively where they went.

ERMINA G. DUNTON.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

CAMDEN, ME., *Sept.* 5, 1873.

(Same notice as to striking out, as not rebutting, given by complainant as in previous deposition.)

619 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of SELDOM D. WILEY, taken on behalf of defendant, at Camden, Maine, Sept. 6, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 2. Please state your name, residence, and business.

Ans. Seldom D. Wiley; stopping here in Camden, Maine; in no business at all now.

Int. 2. Do you know either of the parties to this suit?

Ans. No, sir, I do not.

Int. 3. Do you know Alvin R. Dunton; if so, how long have you known him, and what relation, if any, is he to you?

Ans. I have known him from a boy, and he's my uncle.

Int. 4. Do you know Silas C. Thomas, now residing in East Boston, Massachusetts?

Ans. I do, sir.

Int. 5. What was your business last winter and spring?

Ans. I was stopping with my uncle and taking care of his rooms on Washington street, Boston, No. 214, till after the big fire. After that he moved to 14 Tremont street, and I stopped with him there and took care of his rooms; I don't just recollect how long—until he moved down here.

620 Int. 6. Did you know of the taking of testimony in this suit last spring, at Mr. Thacher's office in Boston at the time?

Ans. Yes, sir, I did.

Int. 7. Did you then know of said A. R. Dunton's being then and there examined as a witness?

Ans. I did.

Int. 8. Were you present at any conversation or conversations between said A. R. Dunton and said Silas C. Thomas, in reference to their time of teaching together? and, if so, state when these conversations took place in relation to the time when said Dunton's testimony was taken, and state what was said.

(Objected to as not rebutting, immaterial, and irrelevant, and hearsay, and as incompetent, intended to contradict any witness, as inconsistent with his statements on the stand, the proper foundation therefor not having been laid.)

Ans. It was. It was before his testimony was taken. Mr. Dunton asked him if he knew when he was with him when he taught down here in Lincolnville; and, if so, what year it was. Mr. Thomas said he could tell by something about one of his children what time it was; and he said then—Mr. Thomas came over the next day, and said to me—Mr. Dunton was out—that he'd found a good thing, that was worth fifty dollars; said that he'd found a recommendation in his Bible to home that Mr. Dunton gave him in 1856; and when Mr. Dunton came in he told him that he should want to see it. Said he, "They'll want to know the facts of this;" and he said, "Poh" to that—said, "Don't you suppose I know." Said he see it this morning. Mr. Dunton told him he should want to be sure on the date; wanted him to fetch it over, and he said he would the next time he came over; and he came over the next day, and Mr. Dunton asked him if he fetched it over, and he said he didn't; he forgot it; and he told him to fetch it over the next time he came over, for they would want to see it, the lawyers would want to see it—I think he said—so there wouldn't be no mistake in the date of it;

621 and he didn't come over for two or three days; and he came in then one day, and he didn't fetch it over then; and he didn't fetch it at all, to my knowledge.

(Answer further objected as not responsive to any conversations between the witness and Thomas.)

Int. 9. Did said Thomas state to said Dunton, at that time, what the date of that recommendation was? and, if so, what did he say? and how did he say he knew?

(Same objection as to last int.)

Ans. He said it was in 1856. Said he see it; he found it in his Bible; said he read it.

Int. 10. Did he state what kind of a recommendation it was, and who gave it to him; if so, what did he say?

(Same objection.)

Ans. That it was a recommendation Mr. Dunton gave him when he was teaching down here in Lincolnville and Hope; that he was qualified to teach.

Int. 11. Did said Thomas state when he had seen and read that recommendation and its date?

(Same objection.)

Ans. He did; that on the morning of the day when he came over he see it and read it, and Mr. Dunton and Mr. Evans, too, he told of it.

Int. 12. Did you, at the time, know of said Silas C. Thomas giving his deposition at Mr. Thacher's office?

(Same objection.)

Ans. I did.

Int. 13. After that did he have any conversation with you in relation to the case; and, if so, when, where, and state what he said?

(Same objection.)

622 Ans. He did, before he had testified and after. After he testified he came into Mr. Dunton's rooms one day and said—Mr. Dunton was out, and Mr. Evans was in there with me—he said that he'd been up to the Parker House and dined with a Jew and the other lawyers on the other side; said they offered him five hundred dollars to go on the other side; said he was damned smart; said he was going to have a thousand dollars out of it. If he didn't get the thousand dollars he would take the five hundred. Said it was a big thing; said it was more than one, or ten, or fifty thousand dollars; said it was no small thing.

Int. 14. Do you remember A. R. Dunton going to Maine last winter; and, if so, did you have any conversation with him before he went as to the object of his going? and, if so, state what that was.

(Same objection.)

Ans. I did. He came in one day and said he was going down east. Said he was going to Camden and didn't know but he should have to go to Belfast, and Searsport, and Hope, and Union. I asked him what he was going down for. Said he was going down to see if he could find a pencil with rubber in one end that he'd left down here somewheres when he'd been down here, rubber in one and lead in the other.

Int. 15. Were you there when he returned? and, if so, state whether any one, and who, came with him, and what, if anything, he told you and did.

(Same objection.)

Ans. I was. He came back and came in; said he, "I got back." Said he found what he went after. Said he'd got his pencil, and took it out and showed to me; and he got it at Mrs. Thomas'; it had rubber in one end and lead in the other. Said he went up to Mrs. Thomas' and went in and told her what he'd come down after; and went out and went down street and came back, and she gave him the pencil; said she found it in her bed-room in her private drawer. Said he

623 never asked for anything there yet but what he found. Said he was two nights on the boat coming up. Said he asked Mr. Matthews to take a part of his state-room—Mr. Lorenzo Matthews—and he said he guessed he wouldn't; and Mr. White stopped with him, he

said, that night. I think he said the boat went into Portland the first night; the next day Mr. Matthews told him he would take his chance with him in the state-room. Said he did stop with him that night. Mr. Matthews came up to the room. I won't say whether he came right in when he did or shortly afterwards. He showed Mr. Matthews the pencil, and told him he'd got to go and see if he could find one that was like that, about the date when it was made; wanted Mr. Matthews to go with him. After he ate his breakfast he and Mr. Matthews went out to hunt after pencils, and he came back in with Mr. Matthews in the afternoon; said he'd had quite a tramp. Said he found one at last, down on State street. He had two or three pencils with him; one was like the one he got down there; one was a black one; one, I don't know what it was. I took the pencils from him and laid them on the table.

Int. 16. When he showed you said pencil with rubber in one end and lead in the other, which he said he had found at Mrs. Thomas' in Camden, did you examine it and notice whether there were any letters or words upon it? and, if so, state, if you can, what they or any of them was.

Ans. There was letters on both sides of it; there was "Rhodes and Son," I think it was, on one side. You couldn't see the full name; it was cut off so you couldn't see the whole name to a lead end on the other. "Herrick and Blunt," he said it was, on the pencil he got that was like it.

Int. 17. Have you seen that pencil which he so brought from Maine since that time?

Ans. No, sir; I have not at all.

Int. 18. Do you think you could recognize it if you were to see it now?

Ans. Well, sir, I think I could. I might be liable to mistakes. I don't know.

624 Int. 19. Look at defendant's exhibits now shown you and state if you find that pencil which said Dunton so brought from Maine and then showed you among them, and then designate it.

(The same exhibits shown to the witness as to Mr. and Mrs. Harwood and Mr. and Mrs. Dunton in the examination above.)

(Defendant's Exhibit E selected by witness.)

Ans. That's it; that was the pencil.

Int. 20. Did you hear said Dunton tell said Silas C. Thomas anything touching the finding of that pencil; and, if so, what did he say?

Ans. He said he found the pencil down there to his mother's. Said he: "I went down to your mother's and told her what I came down for; that I wanted to see if I could find a pencil with rubber in the end of it and lead in the other, here in Camden." He said that he went down town and when he came back she gave him a pencil. Said he never asked his mother for anything but what she had it in the house. I believe that's all I recollect about. I was present and heard him say as above.

Int. 21. What answer, if any, did said Silas C. Thomas make to this?

Ans. He said that he was glad that he got it. I think that's what he said.

Int. 22. Did you ever make any of similar pencil-erasers; that is, pencils with rubber in the end; and, if so, when and how many, and how did you happen to make them?

Ans. Yes, sir; I've made some, last winter or in the spring. I don't know what you call it. I made four. Mr. Thacher came in the room, Mr. Thacher senior, and wanted Mr. Dunton to make him some of the pencils like those that he used to use. Mr. Dunton told me that he

wanted me to make them. He gave me two common cedar pencils and I made them. Afterwards Mr. Thacher came in and wanted some more. Mr. Dunton told me to make one or two more. I didn't do it, not then, and Mr. Thacher came in again in a few days and wanted to know if I had got those pencils made. He told him no, he guessed not; asked me if I'd made 'em, and I told him no, I hadn't; and then he wanted me to make one or two more pencils, and I did so. I made 'em, one for myself, and one for him, or for Mr. Dunton for him.

Int. 23. Did Mr. Thacher say why he wanted them; if so, what did he say?

(Same objection.)

Ans. He said something about it, I don't know as I can word it just as he did. He wanted 'em to show—something about the case.

Int. 24. Did you make the first two of the common pencils before or after Mr. Dunton went to Maine and brought back Exhibit E?

(Same objection.)

Ans. I made 'em before.

Int. 25. Did these have any letters or words or marks upon them?

Ans. No, sir; they did not.

Int. 26. Did you make the other two pencil-erasers before or after Mr. Dunton brought Exhibit E from Maine?

Ans. After.

Int. 27. Did those pencils, or either of them, have any letters, words, or marks upon them?

Ans. Yes, sir; they had.

Int. 28. What were they?

Ans. One of them had "Herrick and Blunt" on one side, and "Rhodes and Sons" on the other. The other one I don't recollect had anything on it, but a common black pencil I made for myself.

Int. 29. What did you do with these three pencil-erasers which you made for Mr. Thacher?

Ans. I gave 'em to Mr. Dunton.

Int. 30. Where is the one you made for yourself?

Ans. I broke it—stepped on it and broke it, some time afterwards—and threw it in the stove. I suppose it burnt up.

Int. 31. Where did you get the pencil with "Herrick and Blunt" on one side and "Rhodes and Son" on the other, of which you made the third pencil-eraser?

(Same objection.)

Ans. Mr. Dunton gave it to me.

Int. 32. Was that the same one which you have stated he went out with Matthews and brought back and gave to you the day he returned from Maine, and which you took and laid on the *the* table as you have testified, (objected to as leading,) or some other one?

(Objected to as before and as leading.)

Ans. It was the same one.

Int. 33. Did Mr. Dunton, to your knowledge, make any pencil-eraser like those, or at all, last winter or spring, or at any time when you were with him himself?

(Same objection as to the 8th direct int.)

Ans. Not to my knowledge.

Int. 34. Would you have been likely to have known it had he done so?

(Same objection, and as leading and incompetent, calling for an inference and not a fact.)

Ans. I think I should, when I was with him I should have known it.

Int. 35. To what extent were you present in his rooms while you were with him?

(Same objection as to int. 8.)

Ans. The most of the time.

Int. 36. Were you there at night?

(Same objection and as leading.)

Ans. Yes, sir.

627 Int. 37. You lived in the rooms?

(Same objection and as leading.)

Ans. Yes, sir.

Int. 38. How many rooms were there at Mr. Dunton's?

(Same objection as to 8th.)

Ans. Two rooms.

Int. 39. Describe them.

(Same objection.)

Ans. These were two rooms on the front of the building, two square rooms or nearly so. In one room we kept wood and such things; didn't use it; in the other we had our beds and stove and writing.

Int. 40. Where did you sleep, and said Dunton sleep, and both of you live and take your meals, and spend your time?

Ans. We both slept in the room where the stove was; took the most of our meals there. Once in a while we would go out and get our meals somewhere, it didn't make much odds, in the lower part under the building. We spent our time in the room there where we slept.

Int. 41. When Mr. Dunton went out with Matthews, and brought back the pencils—the day he returned from Maine, as you have testified—did he bring back anything else besides pencils; and, if so, what?

(Same objection.)

Ans. Yes, sir; he did. Brought back two pieces of rubber.

Int. 42. Describe them.

(Same objection.)

Ans. One was a piece of white rubber, and the other was a piece of kind of wine-colored.

Int. 43. How long were you with Mr. Dunton prior to the great fire in Boston, when he was burned out?

628 (Same objection.)

Ans. I think I was there going on to three months, I should say.

Int. 44. Did you ever see any pencil-erasers like Exhibit E, prior to his bringing that from Maine, except those specimens which you made, as you have testified?

(Same objection.)

Ans. Yes, sir.

Int. 45. When and where?

(Same objection.)

Ans. He had some to his rooms, 214 Washington st.

Int. 46. Was that prior to the great fire, when he was burned out?

(Same objection and as leading.)

Ans. That was before he was burned out.

Int. 47. State how and where you made the specimens you have testified to making; and who, if any, were present and saw you make them, or any part of them?

(Same objection as to 8th.)

Ans. I made them at 14 Tremont street. Mr. Iverson and Mr. Evans and Mr. Green were there.

Int. 48. How did you fasten the rubber into the pencil?

(Same objection.)

Ans. I took and split the pencil down and dug out the lead—some of them; one of them didn't have no lead in it in the end I put the rubber—took and cut it and split a piece right up; then dug it out a little and fitted my rubber to it; put some glue on it; put it back and wound a string on it; let it stay till the glue got dry.

Int. 49. Where did you get your glue?

(Same objection.)

629 Ans. I carried it to a furniture-store and glued them.

Int. 50. Did Silas C. Thomas ever, to your knowledge, have anything to do with the making of such pencil-erasers at Mr. Dunton's rooms?

(Same objection.)

Ans. No, sir; not to my knowledge.

Int. 51. Did said Thomas ever get any glue, or have anything to do with getting any glue, for the pencil-erasers which you made, or for any such pencil-erasers, to your knowledge?

(Same objection.)

Ans. No, sir, he did not; not to my knowledge.

Cross-interrogatories proposed de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. At whose house do you live in Camden?

Ans. The widow Dunton's house.

Cr.-int. 2. What is your age?

Ans. Twenty-four.

Cr.-int. 3. While you were in Mr. Dunton's rooms at Boston, from three months before the great fire till Mr. Dunton moved down here, did you do any other work than take care of his rooms?

Ans. Yes, sir.

Cr.-int. 4. What?

Ans. I went out to Norton and worked four days in the woolen-mill.

Cr.-int. 5. When was that?

Ans. That was this spring.

Cr.-int. 6. Did you do any other work besides four days in the woolen-mills?

Ans. Yes, sir.

Cr.-int. 7. What, where, and for how long?

Ans. It was out in Wayland; worked on a farm there about a month.

Cr.-int. 8. When?

630 Ans. When I first went up there, shortly afterwards, to his place on Washington street, where I worked in Boston. I should have said it was just before I came down East.

Cr.-int. 9. Any other?

Ans. No, sir.

Cr.-int. 10. Did you do any other work in Boston than take care of the rooms?

Ans. No, sir.

Cr.-int. 11. Did Mr. Dunton pay you for taking care of the rooms?

Ans. Yes, sir.

Cr.-int. 12. What work have you done since you have been down East, if any?

Ans. Well, I haven't done much of any what you'd call work. I took care of his horse while he was up to Boston. I set out a few apple-trees; helped set them out; hauled two or three loads of rock. I guess

that's about all the work I've done I can recollect now. I've got a few pails of water and raked after a load of hay; don't consider that much of anything.

Cr.-int. 13. Do you mean Mr. A. R. Dunton by "his" and "he" in your last answer?

Ans. Yes, sir; I do.

Cr.-int. 14. Have you done any work for anybody else since you've been up here?

Ans. Yes, sir. Hauling those rock wasn't for Mr. Dunton.

Cr.-int. 15. Any other work?

Ans. No, sir. The water I was telling you about, and I went down to the market; just went down for the widow Dunton. There was a little more work that I should have said, that I didn't think of. I laid a little walk up there to the house. It didn't take more than half a day. Up to the widow's house where I am stopping now.

Cr.-int. 16. When Dunton and Matthews came back from their expedition to find or buy pencils in Boston, how many pencils did Dunton show you?

631 Ans. He gave me three pencils, I think, and two pieces of rubber.

Cr.-int. 17. What were the marks on each pencil, if any?

Ans. One of them had "Herrick and Blunt" on one side and "Rhodes and Sons" on the other; all there was that I recollect. It was stamped, besides the reading, I think.

Cr.-int. 18. Any other reading on it?

Ans. That's all I recollect, sir.

Cr.-int. 19. When did you look at the marks or reading on the pencil?

Ans. When they gave it to me.

Cr.-int. 20. What were the marks on the other two pencils?

Ans. Don't recollect of any marks on them. One was a black-lead pencil, no lettering on it; the other was a common red-cedar pencil.

Cr.-int. 21. Sure there was no lettering on either of the other two?

Ans. I think there wasn't, I said.

Cr.-int. 22. Are you sure there wasn't?

Ans. Well, I'm more sure that there wasn't than that there was; and yet I wouldn't swear but there might have been some few letters on it.

Cr.-int. 23. Are you positive the other one had letters on it?

Ans. Yes, sir; I am.

Cr.-int. 24. How comes it you are positive about one and not positive about the other?

He gave me the pencil, and said there was one like the one he got down East at Mrs. Thomas', that he got down on State street; and I took it, and looked at the lettering on it, and read it.

Cr.-int. 25. Look at defendant's Exhibit G G, now shown you, and state whether you think that is one of the pencils Dunton then handed you?

(The above exhibit shown witness.)

Ans. No, sir; it was not. I should say so by all means. The pencil he gave me had lettering on it.

632 Cr.-int. 26. I mean any of the pencils he gave you that day?

Ans. I couldn't say as it was or it wasn't. I couldn't swear to it.

Cr.-int. 27. Give us your best impression on the subject.

Ans. Well, I've given you my best impression I can, without lying about it. I don't want to lie to you. I wouldn't say as it was or wa sn't

Cr.-int. 28. Where did you put the pencils Dunton gave you when he came in with Matthews?

Ans. I took and laid 'em on the table.

Cr.-int. 29. When did you next see them?

Ans. I see 'em a dozen times that afternoon, probably.

Cr.-int. 30. Did you see them the next day?

Ans. Yes, sir; I did.

Cr.-int. 31. Where were they then?

Ans. I think that was the day I made the pencils.

Cr.-int. 32. Did they lay on the table all the time till you made the pencils?

Ans. I think they did. Once or twice I had them in my hand. Dunton might have picked them up—might have had them in his hand. Mr. Iverson used to be in there frequently; about every day.

Cr.-int. 33. What rubber did you use in making the pencils?

Ans. The white rubber.

Cr.-int. 34. The white rubber Dunton brought in and gave you?

Ans. I don't recollect whether I took it off of that piece. He used to have rubber in a little box; pieces of different kinds. He had several pieces there. I couldn't swear whether I took that piece or not. Sometimes I couldn't make a piece fit, and cut two or three times.

Cr.-int. 35. Was it the black pencil that Dunton gave you when he came in with Matthews, and that you laid down on the table, that you put rubber in for yourself and afterwards broke?

633 Ans. I wouldn't swear, sir, whether it was or not. There was several black pencils there with no names on them. I couldn't swear whether it was that particular one.

Cr.-int. 36. What became of that particular one?

Ans. I couldn't say; it might be round somewhere.

Cr.-int. 37. How long did it stay on the table?

Ans. I couldn't say how long. I can't say, but it might have been the pencil that he gave me that I made, and it might not. We always had pencils there in the room—the pencil I made for myself I mean.

Cr.-int. 38. How many tables were there in the room?

Ans. One.

Cr.-int. 39. Which of the two rooms you have mentioned was it?

Ans. The one we slept in.

Cr.-int. 40. Did you eat off that table, too?

Ans. No, sir.

Cr.-int. 41. Did you use to eat in that room at all?

Ans. Yes, sir; that's the room we eat in altogether.

Cr.-int. 42. Did you ever use that table for your meals?

Ans. No, sir; not there—we may have used it somewhere else to eat on.

Cr.-int. 43. Was that pencil, with the mark "Herrick and Blunt" on it, that Dunton gave you when he came back with Matthews, right after his return from Camden, as you have testified about the room, so long as four days before you put the rubber in it?

Ans. No, sir.

Cr.-int. 44. Did you fix it the next day?

Ans. Yes, sir; I did.

Cr.-int. 45. What was the date when you say Thomas had a conversation with you after he had given his testimony, and in which you say he spoke of dining at the Parker House?

Ans. Can't tell you, sir.

Cr.-int. 46. What month?

Ans. Well, I don't know as I could tell you. I don't recollect what month it was, but it was shortly after he had given his testimony.

634 I didn't have no interest in it, and it wasn't much of a thing for me, one way or the other.

Cr.-int. 47. Was it as much as a week after he had given his testimony?

Ans. Well, I should think it wasn't far from a week, one way or the other, as near as I can recollect. Mr. Evans might recollect about the facts better than I can. He told it right before both of us in the room.

Cr.-int. 48. It was certainly not more than two weeks?

(Objected to as going beyond the limits of cross-examination, the mode in which it is drawn asserting what the witness is desired to state.)

Ans. I don't think I said that, did I?

Cr.-int. 49. I didn't ask you what you said: I ask you whether it certainly was not more than two weeks.

Ans. I should say *I* wasn't far from a week, one way or the other, as nigh as I recollect. It might have been a fortnight, and it might have been a week.

Cr.-int. 50. Did he say he had just come from dining at the Parker House?

Ans. He did; yes, sir.

Additional direct interrogatories by Mr. Washburne, and answers of the witness thereto:

Int. 51. Won't you explain how you managed in your room at No. 14 for eating? You say you had but one table, and didn't use that for eating on.

Ans. Well, I don't think I said we didn't have but one table. I said we didn't have but one table in that one room.

Int. 53. Please explain how you did manage about eating.

Ans. Well, three or four times we eat in the other room on a table we had there. We had a stand in the room where we slept that we used to eat off of. Sometimes we just sat down in a chair and ate bread and milk without any table at all.

Int. 54. State as nearly as you can the date you worked in Wayland on a farm, as you have stated.

635 Ans. Well, I couldn't tell you that. I think I've stated that as near as I can already; shortly after I went up there to Boston last fall.

Int. 55. State as nearly as you can when you did go to Boston that season.

Ans. A year ago this month, I think—am positive it was.

Int. 56. Now, when was it that you worked those four days in the woolen mill, as near as you can state?

Ans. It was the last of April or the first of May, about; I think I could give you the exact date.

Int. 57. Did you make at that time any memorandum of the date of the conversation with S. C. Thomas that you have just testified to, in which he said that he had just come from the Parker House?

Ans. No, sir; I did not.

Int. 58. Has your attention at any time been directed to the subject of the date of that conversation at any time since it occurred, until you were inquired of by the counsel about it this afternoon?

Ans. No, sir.

Additional cross-interrogatories by Mr. Wetmore, and answers of the witness thereto:

Cr.-int. 53. You say nobody has called your attention to the date of the conversation mentioned in your answer to the last redirect interrogatory. Has anybody called your attention to the conversation itself when it occurred?

Ans. No, sir.

SATURDAY, *September* 6, 1873.

Cross-examination continued:

Cr.-int. 54. You say Mr. Evans was present at the conversation between you and Dr. Thomas when he mentioned dining at the Parker House. Have you spoken with Mr. Evans about it since the conversation occurred?

Ans. He was present. No, sir; not to my knowledge. Never spoke of it but that time.

636 Cr.-int. 55. Have you seen Mr. Evans since?

Ans. Yes, sir; I have.

Cr.-int. 56. Where?

Ans. Here to the rooms, on Tremont street.

Cr.-int. 57. How often was he—Evans—at the rooms?

Ans. He was there frequently; most every day; that is for some little time.

Cr.-int. 58. Is that Mr. Evans the lithographer, who testified in this case?

Ans. Yes, sir; I think he was.

Cr.-int. 59. Was the date of Mr. Thacher's first call, that you have mentioned, before or after the great fire?

Ans. It was after.

Cr.-int. 60. About how long after?

Ans. Well, I don't know as I recollect how long it was. It was some weeks after.

Cr.-int. 61. How long after Mr. Dunton's return from Camden was Mr. Thacher's last call that you have mentioned in your direct?

Ans. I don't know but he was in the same day or the next day.

Cr.-int. 62. When was it, to the best of your recollection?

Ans. Well, I think I give you as near as I can recollect.

Cr.-int. 63. Well, you say you don't know but he was in the same day or the next day. What do you mean by that? I don't ask you what you don't know, but what you do know, to the best of your recollection.

Ans. Best of my recollection is, he was in either that afternoon or the next forenoon—in the morning. I wouldn't swear whether it was that afternoon or the next forenoon.

Cr.-int. 64. Did you ever go out on errands of business when you were taking care of Mr. Dunton's rooms?

Ans. Yes, sir.

Cr.-int. 65. Did he ever send you out?

Ans. Yes, sir.

Cr.-int. 66. Did he always accompany you every time you went out?

Ans. No, sir.

637 Cr.-int. 67. Did you never go out, or were you never sent out, when Dr. Thomas, or Mr. Evans, or some other person was at the rooms with Mr. Dunton?

Ans. I never was sent out when Dr. Thomas or Mr. Evans was in the room.

Cr.-int. 68. Did you ever go out when Dr. Thomas or Mr. Evans was in the room?

Ans. Yes, sir. I've been out to get some water once or twice. I don't know but I went down into the saloon to get a cigar, or something of that kind. I never was out a great while.

Cr.-int. 69. For what purpose did you go and get the water?

Ans. For to use in the room.

Cr.-int. 70. A pail-full?

Ans. No, sir.

Cr.-int. 71. What then?

Ans. Used to get it in the pitcher.

Cr.-int. 72. Did you get the cigar for yourself?

Ans. Yes, sir.

Cr.-int. 73. Smoke it yourself?

Ans. Yes, sir.

Cr.-int. 74. And when you went down into the saloon to get the cigar, or went out to get the water, and Dr. Thomas happened to be there, you went on those errands voluntarily and without any one requesting you to do so?

Ans. Yes, sir.

Cr.-int. 75. Did you ever bring back a cigar for Mr. Dunton on those occasions?

Ans. No, sir.

Cr.-int. 76. Did you ever use to smoke the cigar in the room when you got back?

Ans. I used to smoke cigars in the room; yes, sir.

Cr.-int. 77. Did you ever get a cigar for Dr. Thomas or Mr. Evans on any one of those occasions?

Ans. No, sir.

Cr.-int. 78. Did you ever make any other pencils with rubber in the end except the four you mentioned in your direct examination?

Ans. No, sir; I think not.

638 Cr.-int. 79. Are you certain about that?

Ans. No, sir; I'll correct that. I have made one.

Cr.-int. 80. Was that a black polished wood one?

Ans. No, sir.

Cr.-int. 81. What kind?

Ans. It was made into a pen-holder. Took and burnt a hole into a pen-holder with wire, put in a piece of lead stuff that he had there, and made a pencil of it.

Cr.-int. 82. Where is that?

Ans. I couldn't tell you where it is. I lost it a short time ago.

Cr.-int. 83. Are those four lead-pencils that you mentioned yesterday in your direct examination the only lead-pencils in which you ever inserted rubber?

Ans. Yes, sir.

Cr.-int. 84. Did you ever assist Mr. Dunton in putting rubber in any other pencils except those four?

Ans. No; never assisted him in putting rubber into any pencils.

Cr.-int. 85. Were you ever present when Mr. Dunton was inserting rubber into the end of a wooden pencil?

Ans. No, sir.

Cr.-int. 86. Will you swear positively that you and Mr. Dunton were not engaged, or that he was not engaged in your presence, in inserting rubber in a wooden pencil or pencils on the 26th day of last April, at any time during that day?

Ans. No, sir; I was not. I don't know anything about the day that I found the pencil.

(Question repeated.)

Ans. No, sir; he was not.

(Question repeated.)

Ans. No, sir; I won't swear to it, because I don't know what day it was that I put the rubber into these pencils.

Cr.-int. 87. What time of the day did Dunton and Matthews come in, on their return from Camden?

Ans. They came in in the morning from Camden.

Cr.-int. 88. What time in the morning?

639 Ans. I couldn't state what time in the morning.

Cr.-int. 89. Before or after breakfast?

Ans. Before breakfast. We had breakfast and they went out.

Cr.-int. 90. How soon after breakfast did they go out?

Ans. Went off right after breakfast.

Cr.-int. 91. What did Mr. Dunton say to Matthews?

Ans. I think he told him he wanted to go out and see if he could find a pencil like that one he brought up from Mrs. Thomas'.

Cr.-int. 92. Did he ask Matthews to go with him?

Ans. Yes, sir.

Cr.-int. 93. What time did they return?

Ans. Shortly after twelve o'clock. They hadn't been to dinner.

Cr.-int. 94. Did Dunton say anything about the two pieces of rubber he had brought with him when he came back?

Ans. No, sir; not to my recollection.

Cr.-int. 95. How long did Matthews remain after that?

Ans. I couldn't say how long he stopped.

Cr.-int. 96. About how long?

Ans. Think he might have went out in an hour, and he might have staid longer. Not a great while. He went out that afternoon.

Cr.-int. 97. Did he take dinner there that day?

Ans. Yes, sir.

Cr.-int. 98. Did you take dinner off the stand that day?

Ans. I think we did; but I wouldn't swear positively whether we took dinner there or off a table that was in the other room.

Cr.-int. 99. Took it off of one or the other, you think?

Ans. Yes, sir. I think it was off the stand.

Cr.-int. 100. When you made the Herrick and Blunt pencil into a pencil with rubber in the end, did you open the pencil all the way through—from one end to the other?

Ans. No, sir.

Cr.-int. 101. How far did you open it?

640 Ans. Somewheres from an inch to two inches. I would say an inch and a half or inch and a quarter. It might have been two nches.

Cr.-int. 102. What did you open it with?

Ans. Opened it with my knife.

Cr.-int. 103. Did you do anything to it before you opened it?

Ans. No, sir.

Cr.-int. 104. Did the lead run all the way through?

Ans. No, sir.

Cr.-int. 105. Did you open it at the end where the lead was or where it was not?

Ans. Where it was not.

Cr.-int. 106. Do you remember what the lettering was at the end of the pencil—at the end where you opened it?

Ans. I don't recollect.

Cr.-int. 107. Have you seen that pencil since you gave it to Mr. Dunton?

Ans. No, sir; not to my knowledge. It might have been one of those pencils I had in my hand yesterday. I couldn't swear. I didn't notice it.

Cr.-int. 108. Where is the furniture store where you got the pencils glued?

Ans. I couldn't tell you what street it's on. I could go right to it. The street leads off the Tremont Row.

Cr.-int. 109. What is the name of the person that keeps it?

Ans. I couldn't tell you, sir.

Cr.-int. 110. Describe how you went to get to the furniture store, as nearly as you can.

Ans. I started from the house and went right down to Scollay Square, there by Cornhill, and started right out on the row and turned down to my right—I don't know the street it was on—a short distance; more than half a block; as far as from there (the Ocean House) down town.

Cr.-int. 111. Was it up-stairs or on the first floor, or did it occupy the whole building?

641 Ans. On the first floor, in the back shop or a back room; I don't know which they'd call it.

Cr.-int. 112. Who did you see?

Ans. Well, I couldn't tell you who, by name, it was; I see several men at work in the back room there—three or four. There was a man in the front shop.

Cr.-int. 113. Who got the glue for you?

Ans. I took it myself out of a glue-pot that set on the stove.

Cr.-int. 114. Did you glue the pencil there?

Ans. Yes, sir.

Cr.-int. 115. Did you go to the furniture-store more than once?

Ans. No, sir.

Cr.-int. 116. You yesterday selected Exhibit E as the pencil Mr. Dunton brought back from Camden, and looked at it yesterday. Please, now, state from memory what the lettering is on that pencil?

Ans. I don't recollect what the lettering is. The words on that sido I don't seem to recollect.

Cr.-int. 117. What was Mr. Dunton doing all the time you were with him in Boston?

Ans. Well, he was writing some of the time and altering some of the books, and making a new book that he was going to have.

Cr.-int. 118. Did he keep a writing-school any part of that time?

Ans. No, sir; not as I know of. He used to go round to teach the teachers. I don't know as he called it teaching a school.

Cr.-int. 119. That was away from his rooms he used to go and teach them?

Ans. Yes, sir.

Cr.-int. 120. Was it the "Herrick and Blunt" pencil that you glued at the furniture-store?

Ans. No, sir; it was not.

Cr.-int. 121. Where did you get this glue for the "Herrick and Blunt" pencil?

Ans. It was a piece of glue, I think, that a young fellow gave me that worked in a stair-factory.

642 Cr.-int. 122. Which pencil was it that you glued at the furniture-store?

Ans. It was the two common cedar pencils.

Additional direct interrogatories by John S. Washburn, esq., and answers of witness thereto:

Int. 59. State what, if anything, occurred at the furniture-store when you went to glue your pencils, as you have stated, and how did you happen to go to that particular store?

Ans. When I went to the store I went in and asked the man if I could do a little glueing there; and he said I could in the back shop. I don't know anything else that occurred. I don't know particular how I came to go to that one. O, yes; I asked a boy on the street if there was a furniture-store where I could go and get anything glued; and he said there was, right down below here; and I went down and found it. I said it was all the work I did. I worked a little about painting the house, painted the outside of it for Mr. Dunton in June last. I told yesterday what other work I done; I did not think of this yesterday.

S. D. WILEY.

Sworn to and subscribed before me.

F. DODGE,
Examiner.

CAMDEN, ME., *Sept.* 6, 1873.

Defendant's counsel here offers in evidence a certain paper writing, marked and identified by the magistrate as "Defendant's exhibit L L." (Objected to by complainant's counsel as incompetent, there being no proof either of the handwriting or execution of the proposed certificate, or of the official character of the person purporting to execute the same.)

643 At this point, Saturday, September 6th, 1873, at twelve o'clock m., this examination is adjourned to Mr. Thacher's office, No. 14 Pemberton Square, on Monday, September 15th, 1873, at ten o'clock a. m., at the request of the defendant's counsel. Complainant's counsel do not object to this arrangement, but state that they are ready and willing to proceed next week.

All the above-examined witnesses have, at the request of complainant, been examined separately and apart from each other.

F. DODGE,
Examiner.

CAMDEN, ME., *Sept.*, 6, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of John H. Morison, taken on behalf the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thatcher, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. John H. Morison; Milton, Massachusetts; senior pastor of the First Congregational Parish.

Int. 2. How long have you resided in Milton?
Ans. About twenty-eight years.
Int. 3. Do you know James Sumner, of Milton?
Ans. I do; I have known him since he was a boy in the schools.
Int. 4. What is his general character among his neighbors for truth and veracity?
644 Ans. I know nothing against it.
Int. 5. State whether or not you ever heard any question of it made?
Ans. Never.

JOHN H. MORISON.

Sworn to and subscribed before me.

F. DODGE,
Examiner.

BOSTON, *Sept.* 15, 1873.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto.

(No cross-examination.)

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of James M. Robbins, taken on behalf the defendant, at Boston, Mass., Sept. 15, 1873, before Frederic Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, age, residence, and business.
Ans. James M. Robbins; Milton, Massachusetts; seventy-seven years of age. At present my business is that of a farmer.
Int. 2. You have been a State senator and member of the council in the State of Massachusetts?
645 Ans. I have been in senate and house often; never in the council.
Int. 3. Do you know James Sumner, of Milton; and, if so, how long have you known him?
Ans. Yes; I know him; his father is my neighbor; I have known him all his life-time; that is, more or less. He has been away from home a good deal, and I have myself. I live in town in the winter.
Int. 4. Do you know what is his reputation among his neighbors for truth and veracity; and, if so, what is it?
Ans. I don't think I could say that I know what his reputation among the neighbors is. I don't think that I ever discussed his reputation with them, or heard it discussed in my life.
Int. 5. So far as you know or have ever heard, what is his general character among his neighbors for truth and veracity?
Ans. So far as I have ever heard I should say that his character was

as good as that of other persons of his age and standing. I know nothing to the contrary.

JAMES M. ROBBINS.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

No cross-examination.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of Albert K. Teele, taken on behalf of defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

646 Direct interrogatories by P. Taacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Albert K. Teele; age fifty-one; Milton, Mass.; am a clergyman, pastor of a congregational church—orthodox congregational.

Int. 2. Do you know James Sumner, esq., of Milton; and if so, how long have you known him?

Ans. I know him, sir, and have known him, I cannot state exactly the time, but I think ever since I have been in Milton—twenty-three years. Don't know as I recall him when I first came to Milton; I have known him twenty years.

Int. 3. What is his general character among his neighbors for truth and veracity?

Ans. I have never heard his character questioned for truth and veracity. It is good sir.

ALBERT K. TEELE.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

(No cross-examination.)

Circuit court of the U. S. southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of Thomas H. Hinckley, taken on behalf of defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

647 Direct interrogatories by P. Thacher, esq., for defendant and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business?

Ans. Thomas H. Hinckley; Milton, Massachusetts; fifty-nine years of age; am an artist.

Int. 2. Do you know James Sumner, esq., of Milton; and, if so, how long have you known him?

Ans. I know him, and have known him ever since he was a boy.

Int. 3. How long have you resided in Milton?

Ans. I was born there, and live in the house I was born in. I have always resided there with the exception of three years, forty years ago.

Int. 4. What is the general character of said Sumner, among his neighbors for truth and veracity?

Ans. I know nothing against him. Good, I should say.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. In what part of Milton do you reside?

Ans. On what is called Brook road, between the meeting-houses and Mattapan.

Cr.-int. 2. Where is Mr. Sumner's father's residence?

Ans. Brush Hill.

Cr.-int. 3. How far is it from your house to Brush Hill?

Ans. By the road, I should say about a mile.

Cr.-int. 4. Has James Sumner resided at any other place than his father's during the time that he has been in Milton, so far as you are aware?

Ans. Well, he was a teacher and taught school in other towns. I don't know where; nor do I know how long he was away.

(Question repeated.)

Ans. Not that I know of.

Cr.-int. 5. Do you know Mr. Sumner's father?

Ans. Yes.

648 Cr.-int. 6. Have you been a friend of his for a number of years?

Ans. Not an intimate friend; I've always known him.

Cr.-int. 7. Has there been any connection by marriage or otherwise between your families?

Ans. No.

Cr.-int. 8. Where have you had your studio?

Ans. Near my house, on my own premises.

THOS. H. HINCKLEY.

Sworn and subscribed to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of Stillman L. Tucker, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business?

Ans. Stillman L. Tucker; age, 52; Milton, Mass; I have no business; have been out of health of late years.

Int. 2. How long have you resided in Milton?

Ans. Well, 31 or 32 years; 31 certainly.

Int. 3. Do you know James Sumner, esq., of Milton? If so, how long have you known him?

649 Ans. I do; I don't know why not ever since I have resided in Milton. It must have been very soon after; he lives so near.

Int. 4. Do you know his general reputation among his neighbors for truth and veracity? And, if so, state what it is.

Ans. Well, I should think I should have reason to know. I should say it was good.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. In what part of Milton do you reside?

Ans. The centre.

Cr.-int. 2. How far is that from Brush Hill?

Ans. It's half a mile.

Cr.-int. 3. How long since you have been engaged in any business?

Ans. Four years.

Cr.-int. 4. What business were you then engaged in?

Ans. For nine years previous to that, in the service of the town as selectman, assessor, overseer of the poor, surveyor of highways. Carpenter, previously to that.

Cr.-int. 5. Then you have taken an active part in politics?

Ans. I have not; I've not voted a political ticket for thirteen years.

Cr.-int. 6. Were the offices which you have held elective or appointive?

Ans. They were elective.

Cr.-int. 7. Have you attended the town meetings during the period in which you have been in political office?

Ans. I have attended the meetings. I didn't suppose it was a political office I held by any means.

Cr.-int. 8. What kind of an office did you suppose it was?

Ans. Well, serving the interests of the town; elected as a citizen.

Cr.-int. 9. Were there not opposing candidates on the occasions when you were elected?

Ans. There were.

650 Cr.-int. 10. Do you know whether Mr. Sumner ever took any part in the canvass or election on any occasion when you were elected to office?

Ans. I don't know that he did specially. I knew nothing about it, save that a vote was declared.

Cr.-int. 11. Do you keep house in Milton?

Ans. I have for thirty years.

Cr.-int. 12. Has Mr. Sumner been at Milton all the time since you have known him?

Ans. I should say not.

Cr.-int. 13. When has he been absent?

Ans. I couldn't tell.

Cr.-int. 14. Do you know his father?

Ans. I do.

Cr.-int. 15. Has he been a personal friend of yours?

Ans. He has not.

Cr.-int. 16. Has there ever been any connection between your families by marriage or otherwise?

Ans. There never has.

Cr.-int. 17. Have you ever had any other business than holding office, as you have mentioned?

Ans. I was a carpenter, as I said; that is all.
Cr.-int. 18. How long were you engaged in business as a carpenter?
Ans. I would say ten years.
Cr.-int. 19. Where did you carry on that business?
Ans. I was a journeyman carpenter in Milton.
Cr.-int. 20. Do you know David Tucker, of Milton?
Ans. I do.
Cr.-int. 21. Is he a relative of yours?
Ans. He is not.
Cr.-int. 22. Are you on friendly terms with him?
Ans. Yes, sir.

S. L. TUCKER.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

651 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of GEORGE L. BURT, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.
Ans. My name is George L. Burt; age, 43—44 in November; Mattapan, in ward 16; carpenter and builder.
Int. 2. Do you know James Sumner, esq., of Milton; if so, how long have you known him.
Ans. I do. I have known him twenty-five years. I do not reside in Milton, but in Dorchester, ward 16. Part of that time, though, I have resided in Milton. I might state that before I was married I boarded in Milton. For twenty-one years I have resided in Mattapan—most twenty-two. Under our carrier system we still have a post-office at Mattapan.
Int. 3. Do you know what the general reputation of said Sumner is among his neighbors for truth and veracity; if so, please state?
Ans. It is good. I do know. Yes, sir, it is good.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Where has Mr. Sumner lived since you have known him?
Ans. I should say, the biggest part of the time, at home. He has been away from home some, but how much I could not say.
652 Cr.-int. 2. How far is it from Mattapan to Milton?
Ans. Well, in one point of view it's only across the river; but any particular point in Milton?
Cr.-int. 3. How far is it from your house to Brush Hill?
Ans. Well, to Mr. Sumner's house, I should say about a mile and a quarter.
Cr.-int. 4. By the road?
Ans. Yes, sir.
Cr.-int. 5. What is your voting place?

Ans. Corner of Washington and Norfolk streets, Dorchester, now ward 16, Boston.

Cr.-int. 6. Do you know Mr. Sumner's father?

Ans. I do.

Cr.-int. 7. What is his business?

Ans. Farmer.

Cr.-int. 8. Ever done any work for him?

Ans. Yes, sir.

Cr.-int. 9. When last?

Ans. I should say ten months ago; the last I recollect of now.

Cr.-int. 10. Have you been in the habit of seeing James Sumner frequently?

Ans. Well, you can call it quite frequently. Perhaps sometimes I would see him five or six times a week; sometimes once a week; sometimes not once a month during that time; sometimes longer than that. It's pretty hard to fetch to mind all the times.

Cr.-int. 11. I'd often meet him on the street, often in the cars, and I'd often see him in his father's house when I'd be driving by to work.

Cr.-int. 12. Has he ever visited your house?

Ans. He has.

Cr.-int. 13. Did you ever hear anybody speak of him either good or ill?

Ans. No; I never did.

GEO. L. BURT.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 15, 1873.

653 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER } In equity.

The deposition of Eldridge Blackman, taken on behalf defendant, at Boston, Mass., September 15th, 1873, before Fred'c Dodge, special examiner.

Direct interrogatories by P. Thacher, for defendant, and answers of witness thereto.

Int. 1. Please state your name, residence, and business?

Ans. Eldridge Blackman; age, 35; Milton, Mass.; blacksmith.

Int. 2. How long have you resided in Milton?

Ans. Nearly five years.

Int. 3. Do you know James Sumner, esq., of Milton? If so, how long have you known him?

Ans. Yes, sir; somewhere in the neighborhood of twenty years.

Int. 4. State whether or not there is any other blacksmith of the same surname as yourself in Milton?

Ans. No, sir; not to my knowledge.

Int. 5. Do you know what is the general reputation of said Sumner among his neighbors for truth and veracity? If so, state what it is?

Ans. Yes, sir; I should say it was good.

Int. 6. Has there at any time been any discussion in your shop at Milton, touching said Sumner's general reputation for truth and veracity?

Ans. I never have heard any.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto;

654 Cr.-int. 1. Have you ever heard him spoken of?

Ans. Yes, sir.

Cr.-int. 2. By whom?

Ans. I couldn't state any particular one.

Cr.-int. 3. Where have you heard him spoken of?

Ans. The conversation that I've heard, I have heard in my shop.

Cr.-int. 4. What did you hear said at those conversations, in reference to his truthfulness?

Ans. Never have heard anything, sir.

Cr.-int. 5. What did you hear said in regard to him?

Ans. I have heard said that he talked well—made a good speech on town affairs.

Cr.-int. 6. What else?

Ans. Couldn't say anything more.

Cr.-int. 7. Is that all you ever heard said in regard to him.

Ans. Yes, sir.

Cr.-int. 8. How large is your shop?

Ans. Couldn't tell, sir.

Cr.-int. 9. As near as you can?

Ans. I should say it was somewhere in the neighborhood of 30 by 40.

Cr.-int. 10. Are you pretty constantly employed?

Ans. At times—most of time.

Cr.-int. 11. Have you any assistant?

Ans. Yes, sir.

Cr.-int. 12. Have you taken part in all the conversations that have ben had in your shop?

Ans. No, sir.

Cr.-int. 13. Have you heard all the conversations that have been had in your shop?

Ans. No, sir.

Cr.-int. 14. Have you been in the habit of paying much attention to the conversations that have been had in your shop?

Ans. No, sir.

Cr.-int. 15. Have you taken any part in town politics?

Ans. Not particularly.

655 Cr.-int. 16. Were you a Grant or a Greeley man at the last Presidential election?

Ans. Grant.

ELDRIDGE BLACKMAN.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER.

The deposition of ALFRED FOSTER, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Alfred Foster; age 35; Hyde Park, Mass.; clerk for Little, Brown & Co., law booksellers.

Int. 2. State how far Hyde Park is from Milton.

Ans. It is the adjoining town. Part of it was formerly in Milton.

Int. 3. Do you know James Sumner, esq., of Milton; if so, how long have you known him?

Ans. I've known him for about eight years, sir.

656 Int. 4. Do you know what is his general reputation among his neighbors for truth and veracity; if so, what is it?

Ans. I have always heard it as good, sir.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witnes' thereto:

Cr.-int. 1. Who have you ever heard speak of him in that respect?

Ans. Mr. Palmer, George W. Palmer, recommended him to me as a man to be relied on to do business for me, as a professional man.

Cr.-int. 2. How long ago was that?

Ans. Eight years ago.

Cr.-int. 3. Did Mr. Sumner do any business for you?

Ans. Yes, sir.

Cr.-int. 4. You asked Mr. Palmer for a good lawyer?

Ans. Yes, sir.

Cr.-int. 5. Where was Mr. Sumner's office then, if he had any?

Ans. I couldn't tell, sir, where his office was. I consulted him at the railroad and he came to my house and done business for me the first time, made out some deeds and things.

Cr.-int. 6. How often have you seen him since?

Ans. I couldn't say. I've sometimes seen him every day in the week, and then again I would miss two or three days and not see him; but I've been acquainted with him and known him ever since.

Cr.-int. 7. Have you seen him as often as once a week during the whole of the time since then?

Ans. I think I've seen him oftener than once a week, but now and then I might miss a week and not see him. He travels on the same railroad with me, and I think has a season ticket, but sometimes he may miss, or I may miss.

Cr.-int. 8. Who else have you heard speak of him but Mr. Palmer in respect of his truth and veracity?

Ans. I'm acquainted with a great many people that know him,

657 but I've never heard anybody say anything against him. I've always looked on him as an honorable and reliable man.

Cr.-int. 9. Have you seen Mr. Sumner at least once in every month during the past eight years?

Ans. No, sir; I don't think I have. I was laid up sick for six weeks myself and didn't see him during that time, to my knowledge. He may have been in to see me and he may not.

Cr.-int. 10. Is that the only interval you can remember when you didn't see him?

Ans. I have no recollection of any length of time without my seeing him. As a matter of course, your next door neighbor may be away any length of time without your seeing him. I've no recollection of his being away any length of time; shouldn't miss him if he was.

ALFRED FOSTER.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept*, 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of Simeon Emerson, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogation by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

658 Ans. Simeon Emerson; Milton, Mass.; age 61; am the collector of taxes in that town.

Int. 2. How long have you resided in Milton?

Ans. Since September, 1833.

Int. 3. Do you know James Sumner, esq., of Milton? If so, how long have you known him?

Ans. Yes, sir. I couldn't say how long, but probably ever since he was old enough to pay taxes.

Int. 4. Do you know what is his general reputation for truth and veracity among his neighbors? And, if so, please state what it is.

Ans. I don't know whether I do or not. I never heard anything against the man, his reputation for truth and veracity, that it was otherwise than good.

Int. 5. How long have you held the office of collector of taxes in Milton?

Ans. Since 1842; with the exception of three years.

SIMEON EMERSON.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of Benjamin C. Vose, taken on behalf of defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto:

659 Int. 1. Please state your name, age, residence, and business.

Ans. Benjamin C. Vose; 41 years old; reside at Hyde Park, Mass.; acting cashier for the Bay State Iron Co.

Int. 2. Do you know James Sumner, esq., of Milton; and, if so, how long have you known him?

Ans. I do; I have known him ever since we were both boys at school together.

Int. 3. How far do you reside from where he lives?

Ans. About three miles now.

Int. 4. Have you formerly resided near to him; if so, state particularly?

Ans. We were formerly near neighbors, houses less than a mile apart, until I was twenty years old or more; than an eighth of a mile apart.

Int. 5. What is his general reputation among his neighbors for truth and veracity?

Ans. Good.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. How long have you held your position in the Bay State Iron Works?

Ans. Ten years.

Cr.-int. 2. Where is their office?

Ans. 2. Pemberton Square.

Cr.-int. 3. How long have you lived at Hyde Park?

Ans. Since 1861. It was not then a separate town, however—within the limits of the present town of Hyde Park.

Cr.-int. 4. Where did you live immediately preceeding 1861?

Ans. I was about a year at Hingham, Mass.

Cr.-int. 5. Preceding that?

Ans. I was teaching at different places—town of Milton, city of Roxbury for three years, and North Chelsea for a year or more; I don't remember the exact dates.

Cr.-int. 6. Did you live at the places where you taught, during the time that you were teaching?

660 Ans. I did; but spent my vacations at home, at my old home in Milton.

Cr.-int. 7. How long a period was it in all that you were engaged in teaching?

Ans. Fourteen years.

Cr.-int. 8. Have you seen much of Mr. Sumner for the past ten years?

Ans. I think I've met him a dozen times a year; short conversations, and now and then an evening spent with him.

Cr.-int. 9. Did you ever hear anybody say anything one way or the other in relation to his truth and veracity during that time?

Ans. I did not; I don't remember of ever hearing the matter commented upon.

B. C. VOSE.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of George Penniman, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business?

661 Ans. George Penniman; age, 63; East Milton, Mass.; business, nothing.

Int. 2. You have been a member of the State senate of Massachusetts, have you not, and are now a member of the school board of Milton?

Ans. Yes, sir.

Int. 3. How long have you resided in Milton?

Ans. Forty-two years.

Int. 4. Do you know James Sumner, esq., of Milton; and if so, how long have you known him?

Ans. I know him, and have known him for two or three years.

Int. 5. What is his general reputation among his neighbors for truth and veracity, if you know?

Ans. So far as I know, it is good.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Have you ever heard anything said about his truth and veracity, one way or the other?

Ans. I don't think I have.

Cr.-int. 2. Have you ever heard him spoken of at all by anybody?

Ans. I think I have, sometimes; spoken of as a smart young man.

GEORGE PENNIMAN.

Subscribed and sworn to before me.

F. DODGE, *Examiner*.

BOSTON, MASS., *Sept.* 15, 1873.

662 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of A. P. BLAKE, taken on behalf of the defendant, at Boston, Mass., Sept. 15, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Alpheus P. Blake; age 40; Hyde Park, Mass.; real estate.

Int. 2. You are or have been selectman of Hyde Park.

Ans. Yes, sir. I am not now.

Int. 3. Do you know James Sumner, esq., of Milton; if so, how long have you known him?

Ans. I do; I should say about fifteen years.

Int. 4. What is his general reputation among his neighbors for truth and veracity?

Ans. I should say it was good.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 1. How often have you met Mr. Sumner during the period that you have known him?

Ans. Well, quite frequently; perhaps two or three times a month; sometimes more frequently than that.

Cr.-int. 2. Where has Mr. Sumner resided during the time that you have known him?

663 Ans. On Brush-Hill road, in the town of Milton. During one or two years he may have lived away from there. I think he has.

Cr.-int. 3. Has he not lived away from there more than one or two years during that period?

Ans. I don't think I could be positive about that.

Cr.-int. 4. Have you ever heard him spoken of at all?

Ans. Yes, sir.

Cr.-int. 5. Have you ever heard anything said about his truth or veracity, one way or the other?

Ans. I never heard it questioned.

Cr.-int. 6. Have you ever heard anything said on the subject?

Ans. I never have any special discussion on the subject.

Cr.-int. 7. Have you ever heard anything at all on that subject; and, if so, what, when, and from whom?

Ans. I don't see as I can answer that question much different from what I have.

(Ques. repeated.)

Ans. I should say I have never heard the question discussed any way; never discussed it with any one.

Cr.-int. 8. Has Mr. Sumner ever done any business for you?

Ans. I believe not.

ALPHEUS P. BLAKE.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 15, 1873.

The objection of complainants to defendant's exhibit LL, being the marriage certificate of Alvin R. Dunton to Laura L. Pendleton, is here withdrawn.

F. DODGE, *Examiner.*

664 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER } *vs.* EBERHARD FABER. } In equity.

The deposition of WILLIAM H. NORTON, taken on behalf of the defendant, at Boston, Mass., Sept. 16th, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. William H. Norton; Rockland, Maine; seafaring man; age 42.

Int. 2. State whether you know Alvin R. Dunton and Silas C. Thomas, formerly of Camden, Maine.

Ans. Yes, sir; I do.

Int. 3. State whether or not you at any time saw said Dunton and said Thomas in Lincolnville, Maine; and, if so, when, and under what circumstances.

(Objected to as not rebutting to the plaintiff's evidence in reply, and as immaterial and irrelevant.)

Ans. In 1857—the edge of 1858. Mr. Dunton was attending to writing-schools—teaching them; and Silas Thomas was there with him at the time. I won't be positive about the time of day it was; I want to

tell it as near as I can recollect, and my memory, I believe, is pretty accurate; I don't wish to perjure myself as to any part.

Int. 4. State whether or not you met or had an interview with said Thomas at that time; and, if so, where it took place, and what occurred.

(Same objection.)

665 Ans. The interview that I had with Mr. Thomas concerning this pencil—I don't recollect the time of day—Mr. Thomas produced a pencil stating that this was one of Dunton's pencils, showing me a pencil with the rubber on one end, inlaid in the wood, covered with the same kind of a pencil; the other end was lead, as a common pencil.

Int. 5. At the time he showed you the pencil, state what, if anything, was said.

(Same objection, and as hearsay.)

Ans. He showed me what the pencil was for, to rub off anything that was too much on the paper, and stated that that was what he got it up for—to rub off anything that should be too much—that Dunton got it up for. Nothing further, sir, to my recollection.

Int. 6. State who were present at that interview according to your recollection, and where it was.

(Same objection as to int. 3.)

Ans. In the kitchen at the house of William R. Matthews. Can't recollect but one who was present, Mr. Matthews' daughter.

Int. 7. Where was this house of Mr. Matthews?

(Same objection.)

Ans. Lincolnville Centre.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. How long have you lived in Rockland?

Ans. About five years.

Cr.-int. 2. Have you been there for the past month?

Ans. Off and on, sir.

Cr.-int. 3. Were you there week before last?

Ans. No, sir.

Cr.-int. 4. Where were you?

Ans. I was on a trip to Portsmouth.

666 Cr.-int. 5. Who did you first speak to about seeing this pencil at Wm. R. Matthews'?

Ans. Don't recollect.

Cr.-int. 6. Haven't you told anybody about your seeing the pencil before you came here to testify?

Ans. Never said anything since that time that I see it with Mr. Thomas.

Cr.-int. 7. Haven't you previously made a written statement of the alleged facts in regard to which you testified here to-day?

Ans. I have not.

Cr.-int. 8. Have you not signed such a statement?

Ans. I have not.

Cr.-int. 8. Have you not spoken previously to your testifying here to-day concerning the alleged facts of which you have testified, either to Mr. A. R. Dunton, or to Mr. Crockett, of Rockland, or to Mr. Thacher?

Ans. No.

Cr.-int. 10. And you never, then, have related the said alleged facts to any person whatever, from the time you say you saw the said pencil in Mr. Matthews' kitchen, until you gave your testimony here this morning?

Ans. I have not.

Cr.-int. 11. What were you doing in Mr. Matthews' kitchen at the time?

Ans. Don't recollect the particulars.

Cr.-int. 12. What was your business at that time?

Ans. I was sick with fever and ague, and was a boarder.

Cr.-int. 13. Did you attend to any other business at that time.

Ans. Went to his writing-school a little, not the whole time.

Cr.-int. 14. Did you live at Lincolnville at that time?

Ans. I had just returned from sea a short time before that.

Cr.-int. 15. What color was the pencil?

Ans. Can't remember whether it was black or was it yellow; but it was a common pencil, a round pencil.

Cr.-int. 16. What was the color of the rubber?

667 Ans. I can't remember what the color of the rubber was, but I think it was white, same as this common rubber you see.

Cr.-int. 17. Did he show you anything else at that time?

Ans. He did not.

Cr.-int. 18. Was anybody else present besides yourself and Miss Matthews?

Ans. I don't remember if there was any one else present in the room.

Cr.-int. 19. Was it in the day or night time?

Ans. Day.

Cr.-int. 20. Who else was boarding in the house at the time besides yourself?

Ans. Silas Thomas. No one else.

Cr.-int. 21. How long did you remain there then?

Ans. Remained, altogether, betwixt two and three months?

Cr.-int. 22. Where did you go then?

Ans. To Rockland; from there to New York.

Cr.-int. 23. How long did you stay in Rockland and how long in New York?

Ans. Three days in Rockland and one week in New York.

Cr.-int. 24. How did you go from Rockland to New York?

Ans. The schooner Emma Furbush.

Cr.-int. 25. How long a voyage did you have?

Ans. Somewhere about ten days on the passage.

Cr.-int. 26. What month was it when you arrived in New York?

Ans. Can't recollect; but I think it was in January.

Cr.-int. 27. Did you go as officer or seaman?

Ans. Seaman.

Cr.-int. 28. How long have you known A. R. Dunton?

Ans. I became acquainted with him at that time—in 1857—when he was keeping the writing-school.

Cr.-int. 29. Did Thomas say at the time that it was a patented pencil, or anything of that kind?

Ans. Don't remember.

668 Cr.-int. 30. Was Thomas boarding at Mr. Matthews' when you came to board there?

Ans. Can't remember whether he came before I did or not.

Cr.-int. 31. What is your best recollection?

Ans. I think that he came after I did.

Cr.-int. 32. How came Thomas to come into the kitchen on the occasion you have mentioned?

Ans. Because that was—the kitchen and sitting-room was one.

Cr.-int. 33. How long had you been at Matthews' when you saw this pencil?

Ans. Don't remember. It was while he was there.

Additional direct interrogatory by P. Thacher, esq., for defendant, and answer of witness thereto:

Int. 8. State whether or not any person was there assisting Mr. Dunton besides Thomas in his schools, if you remember, and who it was.

(Same objection as to int. 3.)

Ans. His wife, Mrs. Dunton.

WM. H. NORTON.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 16, 1873.

(Complainant gives notice that they will move to strike out the foregoing deposition as not in rebuttal, and as relating to prior knowledge of a person not stated in the answer.)

669 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of ALDEN CROCKETT, taken on behalf of the defendant, at Boston, Mass., Sept. 16, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Alden Crockett, age 42—shall be 42 this month; Rockland, Maine. I am clerk in the superintendent's office of construction of the new custom-house there.

Int. 2. Are you acquainted with either the plaintiff or defendant in this case?

Ans. I am not.

Int. 3. Are you acquainted with Alvin R. Dunton, writing-master; and, if so, how long have you known him?

Ans. I am acquainted with him. I have known him ever since I was a small boy.

Int. 4. Are you acquainted with Joseph Illfelder, now present; and, if so, how long have you known him?

Ans. I am slightly acquainted with him, and have known him since spring. I think since some time in May.

Int. 5. Where did you then become acquainted with him, under what circumstances, and what, if anything, then or subsequently occurred between you?

670 (Objected to as immaterial.)

Ans. He introduced himself to me at the Thorndale Hotel, in Rockland, Maine. Said that he was agent of some pencil company, and was getting evidence in some case that they were having—some trial that they were having with another company; that he had been told that I was a detective, and he wished to employ me to get evidence for him in this case. He wished me to get evidence of persons who had been to

school to Mr. A. R. Dunton—to writing-school. The evidence he wanted was, that they had been to school to him, and had never seen him use a pencil which he described to me by taking another pencil from his pocket, saying that he wanted to know if they had ever seen him use a pencil cut in here and split out and a piece of rubber inserted, and then the wood part glued on or put on in any way—tied on, I believe he said, glued on or tied on. He asked me if I thought I could find persons here that couldn't be impeached, and that was good reliable testimony, who would swear that they never saw him use any such pencils; by here I mean here in Rockland. I told him that if there were any such here that I could find them, and would do so, providing I was paid for it. He said if I would go to work for him and get such testimony he would pay me well for it; said that the company was rich, and that they would pay a large price for any such kind of testimony. I had some talk with him in regard to the pay for myself. I told him that I wanted to be sure that I could get my pay. He asked me how much I would go to work for him for; how much I would charge to go to work. I told him that the company was wealthy; that they could afford to pay well for it; that I wanted to be paid well, and that I should charge him a pretty good price. He said he was willing to give a good price for the kind of testimony that he wanted. He asked me how much I thought it was worth. I told him I thought it was worth a thousand dollars. He said he thought the company would be willing to give a thousand dollars for such testimony, and then asked me about
671 different men, parties in Rockland, if I knew them; Mr. Joseph Young he mentioned; Mr. Lowe; I told him I did know them; he asked me if I would see them, and get them to testify if they would; said he was going to see them himself as he went back to Camden; asked me where they were, and I told him where he could find them. In the conversation he spoke of Mr. Dunton; asked me if I knew anything about him. He spoke of his sleight of hand performances; asked me if I had ever seen him do such things. I told him I had; he then told me that Dunton had slept in a room up to Camden, of a woman—he named the woman, but I forget the woman's name—that while in this room he put a pencil into a drawer or trunk. He said the drawer was locked; wanted to know if I thought he could do it by sleight of hand. I told him I didn't know certain, but if he said he could, I thought he would. He asked me what I knew against Dunton's character. Well, I told him I didn't know as knew anything in particular against his character; that he bragged a good deal on his writing, and on wrestling, too, I believed. I mentioned also that I read a piece in a western paper, I thought in a St. Louis paper, in which this paper set him out as having the biggest dog, the biggest gold-headed cane—I think it said—I don't know but I told him other things. I think I did, in regard to this piece. It mentioned the biggest diamond ring—it was a sort of a puff for Dunton, you might call it, in the paper. He asked me if I could get that paper. I told him I thought I had one, (I did think so at the time,) and would get it for him. He asked me if ever I saw Dunton out West. Told him I had. He asked me if ever I saw him in Memphis. I told him I never had seen him there. He said they had a man who had seen him at the Memphis races. He named the year, but I couldn't swear positively what the year was. I told him that very likely he might be to the races, as he was a man that liked sport. If he had been there I thought I could find it out by him, Dunton. He wanted me to do so. We had other conversation, mostly in regard to my trying to get these witnesses,
672 this evidence, these men; he wanted me to get first-class men as

there were in the town; good business men who had been to school to him. After some such conversation he told me that he would see me again; said he was stopping in Camden, and would be down often to see me. He left and said he was going to Camden.

During this conversation here, I saw him at several times, once the interval I went to dinner, and other intervals, perhaps fifteen or twenty minutes; I don't know exactly how long. The next time I saw him he came alone at first, and met me on the street; we had some conversation in regard to this matter, and he spoke of Seldom Dunton, the lame man, a brother of A. R. Dunton. I told him I didn't want him to mention his name to me at all; that I hated him; that he was a miserable scoundrel. I told him that he didn't dare to show himself in the town, that the people generally hated him here. While in conversation, two gentlemen came up and he introduced them to me as his lawyers, I think he said; we had some conversation in regard to this matter; the gentleman he introduced me to seemed to want to get evidence against Dunton's character, A. R. Dunton, and they asked me about this paper, if I couldn't get it for them. I told them that I had hunted for it, but couldn't find it—that I had probably lost it. They were in a hurry for the train, so they said, and one of them, I think the largest one, asked me if I would write to him or answer a letter, I think he said from him; I told him I would. They bade me good morning and went in the train, as I suppose; that's about all. He also mentioned at some time in the conversation, I didn't know exactly what time, that he had employed a man by the name of Starrett, over to Thomaston, to get evidence for him; wanted to know if I knew him.

(Answer objected to as hearsay, incompetent, no foundation having been laid therefor by cross-examination of Mr. Illfelder, or any previous witness, and as irrelevant.)

Int. 6. Have you ever seen the two gentlemen whom said Ill-
673 felder introduced to you as his lawyers since; and, if so, when and where?

(Objected to as not rebutting, immaterial, and irrelevant.)

Ans. I have never seen them since till now. I suppose these to be the two men. [The witness designates Mr. Blake and Mr. Wetmore.] I think he introduced me to one as Mr. Blake; I don't remember the other's name; I had the conversation with Mr. Blake.

Int. 7. Did you know of the second marriage of said A. R. Dunton; and, if so, when did you first see him afterwards, and where, and what occurred?

(Same objection.)

Ans. I met Mr. Dunton, in 1855, on the street in Rockland. It was in the fall. I passed him. He was walking with a lady; and, as I passed him, I bowed to him. He returned the bow, and I had passed along perhaps ten feet by him when he came up to me, saying, "Crockett, how are you?" We had some conversation then—very slight—merely passed the time of day—something like that. He said that this was his wife; he was just married, and—it's so long ago that I don't recollect the exact conversation. I was so much struck with the lady's appearance I can see her now just as plain as I could then. I inquired of some persons there in town—I don't know who—if that was Mr. Dunton's wife, and they said it was. I think it was Mr. Bills, that used to live in Lincolnville, that I inquired of.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Do you remember what month in 1855 you saw Dunton?

Ans. I don't know the exact month, but it was late in the fall.

Cr.-int. 2. Do you think it was before or after November?

674 Ans. Well, if I should think about it, I should think in the last part of November. I couldn't swear positively to it.

Cr.-int. 3. Did you see the newspaper containing the account of Dunton out West or at Rockland?

Ans. I have seen it at both places—out West and at Rockland.

Cr.-int. 4. Do you remember about what time it was when you first saw it.

Ans. No, sir; I don't remember exactly.

Cr.-int. 5. Was it before or after you saw Dunton at Rockland that you saw that paper?

Ans. It was before; I think it was before; I'm not positive about it, as I had the paper in my possession a good while.

Cr.-int. 6. According to your recollection of it, was it not an article purporting to come from a Memphis paper, referring to Dunton's appearance at Memphis, and copied into a St. Louis paper?

Ans. I think it was copied from an Illinois paper.

Cr.-int. 7. When did you first go West?

Ans. In 1850.

Cr.-int. 8. How long did you remain at that time?

Ans. I stopped until the —— I left Cincinnati for home December 15th, 1850.

Cr.-int. 9. When did you next go West?

Ans. I think in the spring of 1853.

Cr.-int. 10. And how long did you stay then?

Ans. Till some time in 1854.

Cr.-int. 11. When did you next go West?

Ans. I've been so many times that I can hardly remember. I think it was in 1856.

Cr.-int. 12. Were you there at all during the year 1855?

Ans. I don't recollect.

Cr.-int. 13. Were you there in 1857?

Ans. Yes, sir. I went out in the last part of 1857 and came home in 1858. I don't recollect. It might have been the spring of 1857. I know I came home in 1858.

Cr.-int. 14. How long were you out West in 1856?

675 Ans. I couldn't tell you, sir.

ALDEN CROCKETT.

Sworn to and subscribed before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of PETER THACHER, taken on behalf of the defendant, at Boston, Mass., Sept. 16, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Peter Thacher; business residence, Boston; counsellor and attorney at law; firm-name, Peter and Stephen Thacher; place of business, 14 Pemberton Square.

Int. 2. You are of counsel for the defendant in this suit?

Ans. I am.

Int. 3. Do you know Alvin R. Dunton, writing-master; and, if so, how long have you known him?

Ans. I do; since January 2d, 1873, which was the first time I ever saw him, as I feel sure.

676 Int. 4. Please look at defendant's exhibit E, now shown you, and state when and where you first saw it, by whom, if any one, it was shown to you, and what occurred.

(Said exhibit shown witness.)

Ans. On the morning of February 20, 1873, Alvin R. Dunton came into our office and produced a pencil-eraser which I have no doubt was Exhibit E which I now hold in my hand. I examined it with some care, and have a distinct recollection of it. He said he had just arrived on the boat from Camden that morning; that they left Camden Tuesday night previous, this being Thursday; that they had bad weather and a storm and the boat put into Portland and staid there for a time, that night and part of Wednesday. I made some inquiries of him as to where he found it. He told me Mrs. Thomas found it in her house in Camden. I will refresh my recollection by looking at a memorandum which I have. He said at the same time that it was a pencil-eraser which he left in Camden in 1855. My recollection is, that he was here some twenty or thirty minutes, perhaps not so long, and that he took the eraser away with him when he went out.

(The foregoing answer objected to as hearsay.)

Int. 5. How did said Dunton happen to go to Camden, if you know, at that time?

Ans. At the first interview with him, Jan. 2d, 1873, as stated, he told me of having made and raised pencil-erasers, being common lead-pencils with the lead taken out, taking the lead out at one end and inserting a strip of rubber, fastening on the piece of pencil which he had taken off for that purpose—many years before, as early as 1852 or 1853—and I immediately communicated that statement to Mr. Washburn, associate counsel, who requested me to ask Mr. Dunton to make some pencil-erasers just like those which he stated to me he made and used some years previously.

677 (Evidence of contents of witness' communications objected to, the written communications themselves not being produced.)

I called at once on Mr. Dunton, at his room, 14 Tremont street, and requested him to make some specimen pencil-erasers, just like those which he had formerly made and used, as he had stated to me. He alleged press of engagements, and said he would as soon as he could. I spoke to him occasionally during the month of January, but he always excused himself, on the ground that he had been busy and not able to attend to it. I called on him on Monday, February 3d, and urged him, pressed him about it, told him we wanted those specimens he promised to make, and he promised to attend to it; said he would have some made by the next day. I think I called again the next day, the 4th, found he hadn't done anything about it; he then engaged to have some ready by the next Saturday, which would be February 8th, but fearing that he might not attend to it, I went up on Friday, the 7th, to impress it upon him; he was not in, but I found his nephew, Seldom Wiley, there, and saw upon the table some pencil-erasers in the process of construction; I

think, perhaps, one might have been finished. I don't recollect that I saw him again until the following Thursday, the 13th. He then brought into the office two erasers—one having a style in one end instead of lead, the other being the pencil-lead, and both having rubber inserted at the opposite end—one being style and the other lead. At that interview he said that Camden used to be his headquarters when he was engaged down in the State of Maine in teaching penmanship; that he left there in 1855, drawing and writing materials, pencils, pens, &c., to a considerable amount in number, and he said he thought if he could go down to Camden, he should be able to find one or more pencils-erasers which he made and used as early as 1855. He said he had relatives in Camden, and should like to go down there very well, and wanted to know if we would pay his expenses if he would go down there
678 and see if he could find pencil-erasers as he made them originally. He spoke of being able to find them at Hope, Belfast, or Appleton, if he couldn't find them at Camden, they being places where he used to teach in these years. Some conversation occurred as to what his expenses would be, and when the steamer would go. It was found that the steamer's sailing-day was Friday afternoon, and I told him I would let him know Friday afternoon in season to go by the boat; he came in on Friday, rather late—I had in the mean time consulted with my associate—and he said his expenses would be about twenty dollars to go, and I told him I would be accountable for his expenses to that amount, if he were a mind to go and see what he could find. He said he would go; he started, as he said, to go on the boat; he came back I think about dusk, and said he was too late, the boat had gone when he got to the wharf, and he would go on the cars that evening. He then left the office, and I saw him no more; nor heard from him till he came in with the pencil-eraser, on the morning of February 20th, as I have stated. I believe that answers the question.

(Answer objected to as immaterial and hearsay.)

Int. 6. What became of the two specimen pencil-erasers which he brought you before he went to Camden, and which you have described?

Ans. I forwarded one of them to Mr. Washburn, the one which had a style in the end; the other Dunton took away, saying he wanted to show it to some person or persons. He afterwards brought in—sometime afterward—two pencil-erasers and a pencil, one of which pencil-erasers I should judge to be the same one which he brought in and took out that morning, I having told him when he brought in the first two that I wanted him to make some more specimens—specimen-erasers.

(Same objection to answer.)

Int. 7. Were there any marks, words, or letters upon the specimen which he so brought in, took away, and brought back again?

679 Ans. My recollection is that it was a plain red-cedar pencil. I have no recollection of any words upon it; I should say there were not; I think not.

Int. 8. Did he return that specimen with still another, as you have stated, before or after he showed you Exhibit E, on his return from Camden, as you have testified?

Ans. Some time after.

Int. 9. Describe that other pencil-eraser.

Ans. When he brought in the one I supposed to be the one he had previously taken away, he also brought with it an eraser and a pencil, making three in all. The pencil-eraser which I then saw for the first time was similar to Exhibit E; that is, there was "Rhodes and Sons" and "Herrick and Blunt" on the pencil, stamped on the sides.

Int. 10. Do you mean in your last answer that besides the specimen pencil-eraser which he returned, he brought to you another pencil-eraser, the pencil of which was stamped as you have stated, or that he brought these, and also another pencil?

(Objected to as leading.)

Ans. I thought I had expressed myself so as to be understood. I meant that he brought in three pencils—two of them being what we term pencil-erasers, having lead at one end and rubber in the other, and the third being a pencil without the rubber.

Int. 11. Describe that pencil without the rubber.

Ans. I think it was the same manufacture as the pencil-eraser of which I have spoken, and which I had not seen till then. I think it had "Herrick" on it without the Blunt. I wouldn't fix the initials.

Int. 12. What was the condition of the pencil in the pencil-eraser with "Herrick and Blunt" on it, and of the pencil with "Herrick" without the "Blunt" on it when he so brought them to you, with reference to their being old or new, used or unused?

680 Ans. They appeared bright, and struck me as entirely new. I think they were of the ordinary length, and that one end of the pencil was sharpened.

Int. 13. How long was this after Exhibit E was shown you on the morning of February 20th?

Ans. It was some time after. I'm not able to state the exact time, but I should say it was previous to the first examination of witnesses here, for the defense, which was some time in March.

Int. 14. Was Exhibit E, when he first showed it to you on the morning of February 20, in the same condition that it now is?

Ans. So far as I can see, except that I think that the rubber is very much less stiff than it then was. I have seen it in the hands of counsel a good deal, pressed backwards and forwards between the thumb and finger during the examination of witnesses.

Int. 15. Are you able to state, from recollection, whether the letters and words on Exhibit E appeared upon it then as they do now or not, and whether there is anything special about it, and what, which you then observed?

Ans. I should say that they did then appear upon it just as they do now. I noticed the inscriptions upon it then as they are now, according to my recollection, and the general appearance of the pencil as to the length, size, shape, appearance, and manufacture.

Int. 16. What became of the pencil without rubber, upon which was inscribed "Herrick," without "Blunt?"

Ans. When Mr. Dunton brought those three, to wit, the two pencil-erasers and the pencil, and handed them to me here in the office, as I was sitting at the desk there where I usually sit, he referred to my request that he would make, or have made, some more pencil-erasers. Not considering them then of any consequence, as Exhibit E had been found, I put them into the second drawer on my right as I sat, and there they remained until the complainants were taking their testimony at the Parker House this summer—I believe in June. I then gave two of the three, including the pencil-eraser made of the Herrick and

681 Rhodes and Son pencil, to Mr. Washburn; the third, I think, had been taken out of the drawer by my partner for some reason just before.

(At this point, September 16th, 1873, at 2.30 p. m., an adjournment was taken by consent until 3.30 p. m. of the same day, when the deposition was continued pursuant to adjournment, as follows:)

On reflection, I desire to correct the last clause of this answer, by saying that I handed two out of the three to Mr. Washburn without designating any particular ones.

Int. 17. Please state, if you know, where Mr. Dunton obtained the pencil of the pencil-eraser marked "Herrick and Blunt" and the pencil marked "Herrick" without "Blunt," which he brought you some time after he showed you Exhibit E on the 20th of February, as you have testified, and state how you know?

Ans. When Mr. Dunton took away Exhibit E, on the morning of February 20th, as I have stated, after showing it to me, and being here a while with it, my recollection is that he said he was going to see if he could find some pencils of the same make or manufacture. I know that he afterwards told me that he did find some of the same make; and, I think, that when he brought in those three pencils, two of which were pencil-erasers, as I have stated, he said that one or more of them was what he bought, or got, or found that morning when he was looking for pencils similar to Exhibit E. That is all the knowledge that I have on the subject.

(Answer objected to as hearsay.)

Int. 18. Did you have any conversation with Silas C. Thomas, before he was examined as a witness for defendant in this suit, with reference to what he could testify to, and, if so, state generally how what he then stated compared with his deposition subsequently taken?

(Objected to as hearsay and immaterial.)

682 Ans. He came here to the office and voluntarily stated to me what he said he knew in reference to the subject-matter in controversy, and he stated to me substantially what he testified to afterwards. One exception I remember; he stated repeatedly that the pencil-eraser he testified that he made in 1860 or 1861, that he made it in 1857, and I never heard any different statement until he testified on the stand. I refer to defendant's exhibit C.

Cross-interrogatories by E. Wetmore, esq., for complainants, and answers of the witness thereto:

Cr.-int. 1. Have you in your possession or under your control, and, if so, will you produce, any of the pencils or pencil-erasers which you have mentioned in your direct examination as brought to you by Dunton, and which are not already in evidence?

Ans. I haven't any of them in my possession. I delivered them, as I have stated already, all that I ever had, to Mr. Washburn. I suppose that so far as they are not in the case that he will produce them if they are in his possession, if required, or voluntarily.

Cr.-int. 2. Was the gentleman who removed one of the three which you placed in your drawer Mr. Stephen Thacher, now present?

Ans. He was.

Cr.-int. 3. Was that removal prior or subsequent to your delivery of the other two to Mr. Washburn?

Ans. It was prior, and the reason I did not deliver the three was, that one was gone.

Cr.-int. 4. Do you know where the third one now is—the one removed by Mr. Stephen Thacher?

Ans. Yes, sir; it was given by him to Mr. Washburn, the same day, a short time after I had given the two.

Cr.-int. 5. At the time of the cross-examination of Mr. Edwin W. Gay, the younger of the two witnesses of that name, who was examined, did Mr. Washburn have the three pencil-erasers and pencils originally placed by you in your drawer in his possession?

Ans. I think he had.

Cr.-int. 6. Was the date of your last visit to Mr. Dunton's rooms,
683 prior to his testifying in this case in March, the 7th of February, as you have mentioned in your direct examination?

Ans. I have no recollection of having gone there about pencil-erasers afterward, and don't think I did. I can't say that. I may *not* have called there for some purpose before he testified, although I have no recollection of going there after that day, before he testified. It was, however, the 6th, and not the 7th, that I called there and found the pencil-erasers on the table, as I have stated, and some progress made in making them.

Cr.-int. 7. Was Silas Thomas with Dunton when he called upon you to show you Exhibit E, on the 20th of February, on his return from Camden?

Ans. He was not.

Cr.-int. 8. What time of day was that call?

Ans. I am not able to state precisely. It was in the forenoon, and I should say not far from ten o'clock. I usually got to my office at that time, about half past nine, and I think I had been here then something like half an hour, perhaps somewhat more.

Cr.-int. 9. Were the communications referred to in your fifth direct interrogatory in regard to the request of Mr. Dunton to make some pencil-erasers in writing; and, if yea, will you produce them?

Ans. The communication from Mr. Washburn to me in which I was desired to ask Mr. Dunton to make some pencil-erasers for exhibits to be used in the case were contained in a letter. That portion of the letter which contained this request I should have no objection to producing, but the balance of the letter related to discussions not referring to that particular matter, and it would not be proper for me to publish them, they being of a private and confidential nature. I offer to produce that portion of the letter if counsel will say that their examination shall be confined to it.

Cr.-int. 10. Then you decline to produce the whole letter?

Ans. I decline to put the whole letter into the case. I don't de-
684 cline to offer to counsel that portion of the letter which contains the request referred to, on the condition stated.

Cr.-int. 11. Do you decline to produce to counsel of complainants the whole of said letter in order that they may judge what portions there are they may consider material to the subject-matter of your examination and competent evidence relating thereto?

Ans. I do not decline to show it to counsel.

Cr.-int. 12. I think you have stated that you first saw Mr. Dunton on the 2d of January. When did you first hear of Mr. Dunton in connection with pencil-erasers, to the best of your recollection?

Ans. On or about the 24th day of December, 1872. I might possibly have heard of him a day or two earlier, but upon request sent to him, he first came to the office on the 2d day of January, 1873.

Cr.-int. 13. Did you hear of Mr. Dunton through James A. Page, a witness in this case?

Ans. I did not. I first heard of him through my partner, and I think he first heard of him through Mr. Whittemore, the publisher. I so understood it.

Cr.-int. 14. Do you know where Mr. Dunton is now?

Ans. He is somewhere in the city, I suppose. I have seen him to-day. I don't know where he stays in the city.

PETER THACHER.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 16, 1873.

685 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Deposition of JOHN F. MILLIKEN, taken on behalf of the defendant, at Boston, Mass., Sept. 16, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, age, residence, and business?

Ans. John F. Milliken; age 52; 28 Ball street, Boston, Mass.; car-conductor my business has been—now out of business temporarily.

Int. 2. You are the same John F. Milliken, are you, who was register of deeds for some years in Waldo County, Maine?

Yes, sir.

Int. 3. Do you know Silas C. Thomas, formerly of Camden, Maine?

Ans. I do.

Int. 4. Have you at any time this season, and, if so, when, had any conversation with said Thomas, and where, and what was it?

(Objected to as irrelevant, immaterial, hearsay.)

Ans. I have, at my residence, 28 Ball street. I should say about the first of May. He wished to inquire about the time of A. R. Dunton's teaching a writing-school in the town of Lincolnville. He wished to know when it was. My answer was, in 1857. He told me why
686 he wished to know was, he was engaged in hunting up evidence in a case in regard to the patent on a pencil in which there was some four hundred thousand dollars involved. He thought I was mistaken, and I referred him to parties residing in Lincolnville, two of whom were Mr. Hodges and Mr. Matthews, as being men who would recollect the time and corroborate my statement in regard to it.

Int. 5. Had you any subsequent conversation, and, if so, when and where, and what was it?

(Same objection.)

Ans. I had, about two weeks afterwards—I can't recollect the exact time; not more than two or three weeks. I met him in Dock Square; he told me he had been down east, hunting up evidence in regard to the pencil-case—down to Lincolnville—and found things favorable to the parties by whom he was employed. After making the remark that he found things favorable, he made the remark to me that he was not greatly interested; that he didn't care a damn which way the case went; that he had made a good thing out of it.

Int. 6. State whether or not he said anything about his having been paid, and state what he said upon that subject, if anything?

(Same objection.)

Ans. I don't think his pay was mentioned; I don't think he said anything about pay; he said he had made a good thing out of it?

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Have you related everything that was said on that occasion?

Ans. I think I have. The first interview he showed me a specimen of the pencil in dispute. I think that's all.

JOHN F. MILLIKEN.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, MASS., *Sept.* 16, 1873.

687 Circuit court of the United States, southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of LORENZO J. MATTHEWS, taken on behalf of the defendant, at Boston, Mass., Sept. 16, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Lorenzo J. Matthews; age twenty-five the 11th of October; Camden, Maine; conductor on the South Boston horse-cars.

Int. 2. Did you come to Boston from Camden at any time the past winter; and, if so, when, and, if in company with anybody, with whom?

Ans. I did, sir. I left Camden the 18th of February. I was in company with A. R. Dunton on the boat.

Int. 3. Please state when you left Camden, and how long the passage to Boston took.

Ans. Left Camden the 18th and arrived in Boston the 20th, about 8 o'clock. There was a snow-storm, and we went into Portland Harbor and laid there all next day.

Int. 3. Did you occupy a state-room alone on either of said nights, and, if not, who occupied it with you?

Ans. The first night I had no state-room; the second I occupied a state-room with Mr. A. R. Dunton.

Int. 4. Did you have any conversation with said A. R. Dunton
688 on said passage; if yes, state what it was, and what occurred?

(Objected to as hearsay and immaterial.)

Ans. I did, more or less. He showed me a pencil that he said he'd been down to Camden after, that he said there was a lawsuit about. I know I said it was a very small thing to have a lawsuit about. There was rubber in one end and lead in the other. He said he had left it down east as long ago as 1855. He said that he found it at Mrs. Thomas'—that she found it in her bureau drawer. He also said there was one there that his wife had left at Mrs. Thomas' when she was down there, of a different kind.

Int. 5. Did he state by whom that pencil-eraser was made; and, if so, what did he say?

(Same objection.)

Ans. Said that he made it himself, and the way he made it was to

cut in about an inch from the end of the pencil, split off a piece, take out the lead, put back the piece, glue it, wind a piece of string round it, and let it dry.

Int. 6. Were there any letters or words upon that pencil-eraser that you remember; if so, state what?

Ans. There were some stamped into the pencil. Some one and Sons, I think; what they were I couldn't say.

Int. 7. Please look at defendant's exhibit E, now shown you, and state whether that is the pencil-eraser which said Dunton then showed you?

Ans. Well, sir, I should think it was exactly like it; same color, and stamped just like it. I wouldn't swear, but I should think it was.

Int. 8. Where did you go on arriving in Boston on the 20th of February last?

Ans. I came up to No. 2 Mason street and left my valise; stopped there an hour or two; and while I was sitting there Mr. Dunton came in to look after some things he had left there at the time of the
689 big fire, and he asked me where I was going that day. I told him nowhere in particular, and he asked me if I wouldn't go and take a walk with him down to his office, and I did—went down to his office and had dinner there with him *there* that day. After dinner he said he was going out to look for a pencil of the same make as that he showed on the boat the night before. We went out and went into several places, think into one or two places on Cornhill first, and down that way; went up to Mr. Whittemore's on Washington street; couldn't find any there. He told him to go into Mr. Fairbanks', the next door or two above. He didn't find any there. Mr. Fairbanks sent him down on to State street, and said there were a number of places there—don't remember but one—Mr. Gay's. He said they kept all such things there. We went down State street; he went into one place and I stopped on the door-step some time; he was in there some time, and finally I opened the door and stepped in. This man told him that he'd find 'em down at Mr. Gay's, too, and he went out and went down to Mr. Gay's and went in there, I stopping outside. Got kind of tired waiting, and opened the door to tell him I'd go back to where I roomed, and he said, just as I opened the door, "I've found what I want, Matthews." I stepped in then, and he bought some pencils. I don't know how many, two or three or four, and two or three pieces of rubber. He also bought a box of pens, and two or three writing-books, and we came out then, and went back up to his office. I don't think we called at my other place.

Int. 9. Did said Dunton give any reason for seeking for pencils of that manufacture, and, if so, what did he say?

(Same objection.)

Ans. He said, by finding those pencils like that he showed me on the boat, he wanted to show that there were pencils of that kind manufactured as far back as 1854 or 1855.

Int. 10. Where was that pencil-eraser which he showed you on
690 the boat, if you know, while you were going about with him, as you have testified, searching for said pencils?

Ans. He had it with him. He would show it every store he went into, and ask them if they had any pencils manufactured by that company. He did—every store I went in with him, I mean.

Int. 11. Are you the person who was confronted with Edwin W. Gay, during his examination as a witness for complainant, at the Parker House, in this city, in June last?

Ans. Well, I suppose I am. I was there at the Parker House, and Mr. Gay was there. I suppose it was Mr. Gay. He was under examination.

Int. 12. Do you know Silas C. Thomas, formerly of Camden, Maine, and now of East Boston?

Ans. I do.

Int. 13. Have you had any conversation with him since you were at the Parker House at said examination, in June, and, if so, when, where, and state what occurred?

(Objected to as irrelevant, immaterial, and hearsay.)

Ans. I have had a conversation with him. I don't know as I can fix the date exactly. The 10th or 11th. Somewhere about the first of last month. He got on my car over at South Boston. He was riding out of town with my brother, and jumped off of his car on to mine. I asked him where he'd been lately, and he said he'd got mixed up with the lead-pencil matter lately—the patent-right on a lead-pencil. Said he understood that they'd got me into the scrape; something like that he spoke. Wanted to know what I was going to testify to—what I knew about it. I don't think I made him any answer. Think about that time I stepped inside to collect my fares. Well, that's about all the conversation we had that time. I have seen him again since that—week before last—I can't remember the day. He was on my car again, and he wanted to know if I'd testified to anything yet in regard to that pencil case. I told him I had not. He wanted to know if they'd paid me anything yet; how much; and he began to tell how well the parties on the
691 other side paid their witnesses. Said he came down and made a rough statement and they gave him twenty-five dollars. There was something more said about that was better pay than they'd give on the other side—than Mr. Dunton would give—and that he was working for the side that would give the most money. Said he supposed Mr. Dunton would be very mad with him for going over *unto* the other side. Said he didn't care if he was—that he was going to work where they paid him best. He asked me if I knew how much they paid my brother for coming down to the Parker House there once or twice. I told him I did not, that I had had no conversation with my brother about the case, except once or twice. He said he was employed by them now, having five dollars a day looking up witnesses. He advised me to be careful what I said when I was summoned down here, and to make 'em pay me well for my services, as they had money enough on both sides. Said the truth shouldn't be told at all times, and then he jumped off, and that's the last I've seen of him. He said he'd see me again, but I haven't seen him since.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto:

(An adjournment was here taken by consent, Sept. 16, 1873, 6.30 p. m., until to-morrow morning at 9.30 a. m.)

(SEPT. 17, 1873.—Examination of this witness continued, pursuant to adjournment.)

Cr.-int. 1. What time did the boat in which you came with A. R. Dunton from Camden leave Portland?

Ans. Well, she left in the first part of the evening, Wednesday night, I should judge, the first of the evening.

Cr.-int. 2. After or before supper?

Ans. After supper. I had lain down as I was some seasick, and when I woke up she had started.

Cr.-int. 3. Do you think she left earlier than twenty minutes before ten?

692 Ans. Well, I couldn't say certain as to that. I didn't look at my watch. It was a very thick, cloudy night, and very rough. She didn't make very good time.

Cr.-int. 4. Do you think she arrived at her dock here next morning before ten minutes before nine?

Ans. Well, I should think she did. Couldn't say positively, as I didn't charge my memory with the time, but I should think she did.

Cr.-int. 5. How long had you been in Camden before you came to Boston on this occasion?

Ans. My family lives in Camden, and I go down and stop sometimes a week, sometimes two or three days. It was either Friday or Saturday morning the week before, I couldn't say positively. I don't know whether I left here Thursday night or Friday night the week before. The boat made one trip a week then. I don't remember what night she left. I think I got there Friday morning; I couldn't say positively. If I got there Friday morning I was there three or four days.

Cr.-int. 6. Had you a situation in the city of Boston at that time; and, if so, what?

Ans. I had none, sir. I was waiting for a situation then. I had been to work in New York on the horse-cars, and came back here; not getting a situation as soon as I expected, I went down home for a few days.

Cr.-int. 7. Where did you lodge in Boston after your return from Camden?

Ans. No. 2 Mason street, part of the time—most of the time.

Cr.-int. 8. How long did you continue to lodge there?

Ans. Oh, I guess I lodged there a week; it might have been a week.

Cr.-int. 9. With whom did you lodge?

Ans. Lodged alone.

Cr.-int. 10. Who lived at No. 2 Mason street?

Ans. John Kenney kept the house.

Cr.-int. 11. Was it a boarding-house?

Ans. Yes, sir; boarding and lodging.

Cr.-int. 12. Who was the nephew of A. R. Dunton living there to whom you referred yesterday?

693 Ans. The nephew was Oscar A. Wiley. I don't know positive whether he was at Mr. Kenney's at the time I came back and went there. I know he lived there before.

Cr.-int. 13. How long was it after the 20th of February that you obtained a situation?

Ans. Well, it was some time. I didn't get a situation on the South Boston road till the first of June. I went to New York again—stopped at Mr. Kenney's about a week and then went to New York.

Cr.-int. 14. How much of the day-time did you usually spend at Mr. Kenney's while you were boarding there?

Ans. Well, more or less, some days it was stormy and I would be there most all day. Other days I would go out and not be there at all till noon or at supper.

Cr.-int. 15. How many times did you see Mr. Dunton at Kenney's during the week or more that you lodged there?

Ans. I don't think I saw him there but once, and that was the morning I arrived here from Camden. He came in after I'd been there an hour or so, I guess.

Cr.-int. 16. Where did you go immediately on the arrival of the boat?

Ans. I went up to Mr. Kenney's.

Cr.-int. 17. Did Mr. Dunton leave the boat with you?

Ans. Yes, sir; he did.

Cr.-int. 18. Where did you part from him?

Ans. I left him out here at Tremont street; went down to Kenney's myself to leave my valise.

Cr.-int. 19. Did you have any conversation with him up from the boat; if so, repeat all of it that you can remember?

Ans. Well, I suppose we might have spoken together two or three times as we walked up, but what the conversation was I don't remember. We probably didn't walk all the way up without speaking.

Cr.-int. 20. Did you tell him you were going to Kenney's?

Ans. I don't remember that I did, although I might have told him that I was going to lodge there while in Boston.

694 Cr.-int. 21. Where did you breakfast that morning?

Ans. Well, I don't know as I eat any breakfast, what you might call breakfast. I got a sandwich when I got to Mr. Kenney's. I didn't feel much like eating. I was kind of sick on the boat—a sandwich and a glass of lager-beer.

Cr.-int. 22. Did you stay in the house at Kenny's, until Dunton called?

Ans. Well, I might have went out before he called, but I don't know. I recollect that I was sitting down when he came out in the bar-room.

Cr.-int. 23. What did he say when he came in?

Ans. I don't recollect the words he said. He talked with the young man behind the bar about some things that were left there the time of the fire, and then he came along and spoke to me.

Cr.-int. 24. Are you quite sure that occasion wasn't two or three days after the day that you got to Kenney's from the boat, when Mr. Dunton came in, as you say?

Ans. I am quite sure. I know it was the same day that we arrived here.

Cr. int. 25. Did Dunton say what the things were that he was in search of?

Ans. He said that he was in search of a piece of carpeting, one thing, that he had laid down in his room, that he had brought there during the fire.

Cr.-int. 26. Did he say anything about any charts or pencils?

Ans. Well, I think he said he had some pictures or charts that he had drawn, quite a number, that he had left there before that. He didn't take them then. I'm quite sure he didn't say anything about pencils.

Cr.-int. 27. Did he take anything away with him from Kenney's on that occasion?

Ans. Took a roll of carpet under his arm.

Cr.-int. 28. The day he took that roll of carpet away was the day you went round with him to buy pencils?

Ans. Yes.

Cr.-int. 29. Where did you go from Kenny's first?

Ans. Round to his office, 14 Tremont st.

695 Cr.-int. 30. What did you do there?

Ans. Well, I sat round there a while. I guess I wrote a letter to my wife. I had a good chance—pen and ink there.

Cr.-int. 31. What did you do next?

Ans. Well, I guess we ate dinner, about twelve o'clock or one; somewhere round there; don't know exactly; what we called a dinner.

Cr.-int. 32. Where did you eat your dinner?

Ans. In his office.

Cr.-int. 33. What did you have for dinner?

Ans. Well, we had baked potatoes; had some brown-bread and milk, too; had some coffee in a mug; didn't have cups—had mugs; at least, I did.

Cr.-int. 34. Was the dinner cooked in the room or brought in from outside?

Ans. Coffee and potatoes were cooked in the room, but the milk and brown-bread were brought in from outside, I guess.

Cr.-int. 35. Was anybody else there besides Mr. Dunton and yourself?

Ans. Yes, sir; there was a nephew of his did the cooking.

Cr.-int. 36. Did you have any ale for dinner?

Ans. I believe we did send out and get a pitcher of lager beer, if you call that ale.

Cr.-int. 37. Do you remember who went out to get it and where he got it?

Ans. I don't remember whether Mr. Dunton or his nephew went out to get it, nor where he got it.

Cr.-int. 38. Was his nephew there all the time you were there?

Ans. He was out and in two or three times, I think; I was writing and reading, and didn't pay any particular attention; don't know as he did.

Cr.-int. 39. How long did you stay after dinner?

Ans. O, I don't know exactly; perhaps an hour or hour and a half; it might have been two hours. Mr. Duntou lay down and took a short nap, anyway, after dinner.

Cr.-int. 40. Did Mr. Dunton have any of his dogs with him at that time?

696 Ans. Two dogs in the room; I suppose they w*as* his.

Cr.-int. 41. Did they follow him when you went out with him?

Ans. I think not. I don't remember positive, but I think they didn't.

Cr.-int. 42. What did he say to you when you went out with him, if anything?

Ans. Said he was going out to look after some pencils, and asked me if I wanted to go out with him.

Cr.-int. 43. Where was the first place you went to?

Ans. We came out and walked down Cornhill, and went into one or two places going down Cornhill.

Cr.-int. 44. Can you give me the name of any place into which you went, going down Cornhill?

Ans. I cannot.

Cr.-int. 45. Did you go into any place yourself on Cornhill?

Ans. Yes, sir; I did step inside of the door at one place, and the other place I did not.

Cr.-int. 46. Did you step inside at the first or second place?

Ans. First place.

Cr.-int. 47. What did Mr. Dunton say at that place?

Ans. I think he asked if they had any pencils made by that firm. I don't remember the name, and showed them the pencils he had in his hand—that kind of a pencil.

Cr.-int. 48. Should you remember the name if you heard it?

Ans. I don't think I should.

Cr.-int. 49. Was it "Rhodes & Sons?"

Ans. I don't know positive whether it was or not; some one and Sons.

Cr.-int. 50. How long was he in that store?

Ans. Oh, might have been there a minute or two. They told him "no" right off, and then he came out.

Cr.-int. 51. How long did he remain at the next place?

Ans. About the same length of time. I didn't go inside there.

Cr.-int. 52. Did you call at more than two places on Cornhill?

697 Ans. I'm not positive, but I think not.

Cr.-int. 53. Where did you next go?

Ans. Went up into Washington street, to Whittemore's, I think.

Cr.-int. 54. Did you go in there?

Ans. Yes, sir.

Cr.-int. 55. How long did you remain?

Ans. Oh, a few minutes.

Cr.-int. 56. State all that occurred while you were in there?

Ans. Well, I don't know any conversation that passed between them there. I was giving my attention to other things in the store, books, &c. I know that Mr. Dunton was calling to one or two gentlemen there up near the counter. When we turned to come out he told him to go to Fairbanks', one of the gentlemen did, and we went there.

Cr.-int. 57. Where is Fairbanks'?

Ans. On Washington street, same side as Whittemore's, short ways above.

Cr.-int. 58. Did you go in at Fairbanks'?

Ans. I did.

Cr.-int. 59. What was said there?

Ans. Well, he stepped up to the counter and showed them the pencil he had in his hand; asked them if they had any of that kind of pencils; something to that effect. I don't remember the words.

Cr.-int. 60. Where did you next go from Fairbanks'?

Ans. He told him to go down on State street, two or three places down there. Told him he thought he'd be likely to find them at Gay's.

Cr.-int. 61. How long were you at Fairbanks'?

Ans. Oh, we were in there a few minutes. Perhaps five, and it might have been ten. I don't know as it was as long as that.

Cr.-int. 62. Where did you go from Fairbanks'?

Ans. Down on State street.

Cr.-int. 63. Where did you first stop there?

Ans. I don't know the name of the man who kept the store; it was this side of Gay's.

698 Cr.-int. 64. Did you go in there?

Ans. Yes, sir.

Cr.-int. 65. What was said in there while you were there?

Ans. Same as in the other stores. Asked if they had any of that kind of pencil. Think he told him he hadn't any. Wasn't in there but a short time.

Cr.-int. 66. Where did you go next?

Ans. He also told him to go down to Gay's. We started to go down to Gay's, and there was another store between there and Gay's. He stepped in there. I stopped outside till I got a little tired, and I opened the door and stepped in.

Cr.-int. 67. What occurred after you got in?

Ans. Well, as I stepped in, there was a man came from another part of the store with what appeared to be this pencil Mr. Dunton had been carrying round in his hand; he handed it to him, and told they didn't have any. We went from there to Gay's.

Cr.-int. 68. How far off was Gay's?

Ans. Oh, I don't know exactly how far. Same side of the street. It took us a couple of minutes to walk there.

Cr.-int. 69. How long did you remain outside at Gay's?

Ans. Well, perhaps I was outside there—I don't know but I stood there five minutes—stood till I got tired of standing outside, I know. I opened the door and stepped in.

Cr.-int. 70. When you opened the door and stepped in, Mr. Dunton said, "Matthews, I've got them," or words to that effect?

Ans. Yes, he did.

Cr.-int. 71. Did he have them in his hand at the time, or did he have a number of pencils?

Ans. I don't remember whether he had them in his hand or not. I think he had his pocket-book in his hand when I got there.

Cr.-int. 72. Was he in the front or back part of the store when you got in?

699 Ans. Oh, he was a short ways from the door, perhaps ten feet back, perhaps more; perhaps he might have been half ways across.

Cr.-int. 73. Was the counter the left or right hand side of the store as you go in from the street?

Ans. I think there was a counter on the left-hand side, and a counter or table in the center. The store was very much cluttered up, you could hardly tell what was a counter and what was not.

Cr.-int. 74. Was Mr. Dunton about paying for his purchases when you got in?

Ans. Well, he had his pocket-book in his hand. I don't know whether he had paid for the pencils or not. He paid for a box of pens after I got in, and inquired for an old kind of writing-book; that is, I supposed he paid, he had his pocket-book in his hand.

Cr.-int. 75. Did any further conversation occur between him and you after you went into the store and he told you he had got them?

Ans. Not that I remember. I don't know that there was. We got ready to go, and he went back and got a couple of pieces of rubber that seemed to have slipped his mind.

Cr.-int. 76. Did he show you the pencils that he bought in the store?

Ans. I think he handed me one, and I looked at it and handed it back to him.

Cr.-int. 77. Were they done up in a parcel, or did he carry them away loose?

Ans. He took 'em right up and put them into his pocket loose.

Cr-int. 78. Were the other things done up?

Ans. The other things, I think, were—had paper round them.

Cr.-int. 79. Had you got out of the store when he went back to buy the rubber?

Ans. No, sir; I had not.

Cr.-int. 80. Did you hear anything that was said between himself and the persons in the store?

Ans. No, I did not; I heard them talking, but I didn't charge my memory with what they said.

700 Cr.-int. 81. Did you stand by when he bought the rubber?

Ans. I stood by the door and he went back. I don't know but they went out to the further end; couldn't say for certain.

Cr.-int. 82. Did you see the rubber at the time?

Ans. No, I did not; not to examine it.

Cr.-int. 83. Did you see where he took the rubber from?

Ans. No, sir; I did not.

Cr.-int. 84. Where did you go next?

Ans. We came along; came up to Mr. Dunton's office.

Cr.-int. 85. Anybody there when you got there?

Ans. Yes, sir; his nephew was there.

Cr.-int. 86. What time was it when you got there?

A. Oh, I guess it was three or four o'clock; it might have been four o'clock; it might have been a little after.

Cr.-int. 87. What took place after you got there?

Ans. He laid his things down on the bureau, and we had some more bread and milk. I sat there till it got about dusk; got up and said I was going home. He said he had got to go up to a rubber store on School street. Took up a little bundle and went as far as School street with me. There I left him and went down to Mr. Kenney's.

Cr.-int. 88. Was anything said or done about the pencils while you were at his rooms?

Ans. Nothing said to me. I don't know but he might have told his nephew something about his having found the pencil he was looking after. Think there was some such conversation.

Cr.-int. 89. Was anything said or done about the pieces of rubber while you were there?

Ans. Don't know what might have been said to his nephew. There was two rooms, and I took a paper and sat in the back room so I could smoke. He don't like tobacco-smoke in his room. I heard nothing said or done about them.

Cr.-int. 90. Had you ever dined with Mr. Dunton before by his invitation?

701 Ans. No, sir; I think not.

Cr.-int. 91. Did he ever show you any other pencils with rubber in the end except the one you have mentioned?

Ans. I have no recollection of his ever showing me any other.

Cr.-int. 92. Did you see him at Camden before you went on board the boat?

Ans. I did.

Cr.-int. 93. Anywhere except on the dock just before starting?

Ans. Yes; I see him up in front of the Bay View House the first day I see him. I know I shook hands with him, and asked him how he got down there. He came by rail.

Cr.-int. 94. Did he say anything to you about pencils then?

Ans. No, sir; he did not.

Cr.-int. 95. How long was it after your return from Camden with him that you went to New York, and how long did you remain?

Ans. Oh, I think I stopped here a little over a week, or about a week. I staid in New York three or four weeks—I think about four; then I came back to Boston; staid here a while, then I went down home again.

Cr.-int. 96. Did you make a written statement or deposition previously in relation to the matters as to which you have testified?

Ans. I made a statement here to Mr. Thacher, and he wrote it down. I don't know whether you'd call it a deposition or a statement.

Cr.-int. 97. Was that before or after you went to New York?

Ans. After I went to New York; after stopping here a week.

Cr. 98. Do you remember about how long after your return it was?

Ans. No, I don't.

Cr.-int. 99. State to the best of your recollection about how long it was.

702 Ans. I don't know whether it was before I went down east after coming back from New York or after. I couldn't tell.

Cr.-int. 100. Was it near the time of your going down east; either before or after.

Ans. I think it was after I went down east.

Cr.-int. 101. Was it soon after?

Ans. I was round here some time looking for my situation. I couldn't tell how long it was. I didn't charge my memory with it.

Cr.-int. 102. Who first spoke to you about coming to make the statement?

Ans. Well, I used to go in and out of Mr. Dunton's office then quite often, and one day Mr. Thacher, junior, came in while I was there, and Mr. Dunton told him that I came up on the boat when he came up last winter, and he showed me the pencil. Mr. Thacher asked me if I would come up to the office and make a statement of what I knew. I told him I would, and did so.

Cr.-int. 103. And in that statement you related your accompanying Mr. Dunton to buy the pencil, as you have stated in your direct examination, substantially?

Ans. Well, I stated that I went round with Mr. Dunton. I don't know whether I mentioned the names of places, anything of that kind.

Cr.-int. 104. Did you mention going to Gay's?

Ans. Yes; think I did.

Cr.-int. 105. Was that statement dated?

Ans. I don't know whether it was or not.

Cr.-int. 106. Please look at the paper now shown you by counsel for defendant, at request of counsel for complainant, and state if it is the statement then made by you; and if it is dated, state what its date is.

Ans. It is the statement. The date on it is April 28th, 1873.

Cr.-int. 107. Did you make a subsequent addition to that statement, which subsequent addition related solely to the conversations which occurred between yourself and Silas C. Thomas, or other persons, occurring within the last month?

703 Ans. I made a later statement of conversations which occurred between myself and Thomas. I think some of the conversations between myself and Thomas were more than a month ago.

Cr.-int. 108. Well, two months?

Ans. Why, it related to conversation between me and Mr. Thomas. That's all, I guess.

Cr.-int. 109. Had you heard anything said about the pencil-case at Mr. Dunton's rooms, or elsewhere, before the occasion you have mentioned, when Mr. Thacher came in and came up to his office to make your statement?

Ans. Well, I don't know; but I'd heard it mentioned in there about the pencil-case. I had heard them speaking of it.

Cr.-int. 110. Had you ever heard it mentioned before that you might yourself be called as a witness?

Ans. No, sir; I never had. It was mentioned then till Mr. Thacher asked me if I'd go up and make up a statement.

Cr.-int. 111. When you saw Mr. Dunton in Camden, did he say how long he had been there?

Ans. No, he didn't; he told me he had come by rail a day or two before—a short time before; think he told me he stopped in Portland overnight; that he intended to come by boat, but missed the boat.

Cr.-int. 112. Did he say where he was staying or when he meant to return?

Ans. He didn't say where he was staying, but he said he should return by next boat, if he possibly could; that he came on business; and

that if he could get his business fixed, so as to come back by next boat, he should; said he didn't know but he should have to go out of town, and if he did, he couldn't come back by next boat; if he did not, he should.

Cr.-int. 113. Did he show you any other pencil on board the boat?

Ans. I don't recollect that he did.

Cr.-int. 114. Did he not show either a pencil, or a style, shorter
704 than a pencil, on board the boat, and say that either he or his wife used to use such a one as that, but it wouldn't do him any good, because it had no rubber in the end?

Ans. I don't remember of his showing me any other pencil, but he told me that he never could get any rubber that was fine enough to rub out small marks while he was drawing or writing—something to that effect, and that that was the reason why he put rubber into the end of the pencil.

Cr.-int. 115. Didn't he tell you that he'd found a pencil that his wife had left down at Mrs. Thomas'?

Ans. He said that in the drawer where they found this one they found a pencil that his wife had made a present of to Mrs. Thomas while she was there; didn't say he found it.

Cr.-int. 116. Did he describe that pencil, and, if so, what did he say of it?

Ans. I don't know whether he did or not; if he did, I've forgotten what the descriptions were.

Cr.-int. 117. Did he state whether or not it had rubber in the end?

Ans. Don't know whether he did or not—I don't remember. I mean the one Mr. Dunton said his wife made Mrs. Thomas a present of.

Cr.-int. 118. Do you know Charles A. Evans, a lithographer?

Ans. I do not, that I know of.

Cr.-int. 119. Has Mr. Dunton talked with you in reference to this case since you made the first part of this statement, on April 28th?

Ans. Yes, I think he has; said something about it three or four times—several times.

Cr.-int. 120. Who asked you to come to the Parker House?

Ans. I received a note from Mr. Thacher, at my board-place, and I came in answer to it. He asked me to go to the Parker House.

L. J. MATTHEWS.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 17, 1873.

705 The defendant here offers in evidence an exemplified copy of order and judgment reversing the judgment of conviction of Alvin R. Dunton, and said copy is marked for identification by the examiner Defendant's Exhibit MM.

Said paper is objected to by complainant as immaterial and incompetent, and for that it does not appear upon the face of the said paper that the said alleged order or judgment was ever duly made or entered, or that said court had jurisdiction to grant the same, and it appearing on the face of the paper that the said alleged court had not jurisdiction to grant the same.

F. DODGE,
Examiner.

BOSTON, *Sept.* 17, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.
} In equity.

The deposition of DANIEL O. QUIMBY, taken on behalf of defendant, at Boston, Mass., Sept. 17, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto.

Int. 1. Please state your name, age, residence, and business.

Ans. D. O. Quimby—Daniel O.—age 51; Boston, Mass.; my business ordinarily is that of teacher.

Int. 2. Are you a graduate of any college, and, if so, what and when?

Ans. Bowdoin; class of 1843.

706 Int. 3. How long have you been a teacher?

Ans. A professional teacher about twenty-five years.

Int. 4. Are you acquainted with the plaintiff or defendant in this case?

Ans. I am not.

Int. 5. Do you know Alvin R. Dunton, writing-master; and, if so, how long have you known him?

Ans. I do. Something more than twenty years.

Int. 6. Have you been recently teaching, and, if so, where and in what school?

Ans. I resigned a position I had formerly held in Huntington, L. I., in February. For the month of June I was a substitute in the English High School, Boston.

Int. 7. Were you ever in the writing-rooms of said A. R. Dunton, and, if so, when first, and for what purpose?

(Objected to as immaterial and incompetent.)

Ans. November and December, 1853, and a part of January, 1854. I was employed by Mr. A. R. Dunton as a teacher of book-keeping at his rooms, corner of Washington and Summer streets, Boston.

Int. 8. While so engaged, do you remember seeing any particular article there which specially attracted your attention; and, if so, describe it?

(Objected to as not in rebuttal of complainant's evidence in reply.)

Ans. I saw something which was a curiosity to me, which I had never seen before, and which appeared to me to be quite curious. One of them was a cedar-wood lead-pencil, which appeared to me to have been split open at one end, the lead extracted, and the hole punctured out somewhat, notched an inch or more from the end, fastened with a string at the notch, and a bit of India rubber inserted into the aperture, which I have seen Mr. A. R. Dunton use in connection with his lettering and drawing. I saw another pencil constructed somewhat differently; this was also a cedar-wood pencil; it had the appearance of being
707 sliced down on one end, or in some way the lead ingeniously taken out, and the rubber forced into the aperture.

Int. 9. Please look at defendant's Exhibit E, and state how said pencils with rubber in the end, which you then saw said Dunton have and use, corresponded with this exhibit.

(Complainant's counsel makes the request that the examiner be permitted to hand all the exhibits to the witness, and that he be asked to select from the exhibits any one or more of them that may correspond to the article alleged to have been seen in Mr. Dunton's possession.)

(Defendant's counsel consents to the request, and said exhibits are accordingly handed all together to the witness by the examiner.)

Ans. These two would be nearer than anything else. (Exhibits E and D D selected by witness.) This (Exhibit E) comes nearer to the first one described that was notched at the end. As to the other, it has the appearance to me—I think the one first described was the one split down at the end. This (Exhibit D D) comes more near to it than any other. This pencil (Exhibit E) has the appearance to me of having been cleaved off at one side of one end, the lead extracted, and the rubber inserted, and then the piece split off to have been nicely glued on and the rubber fastened in. That is my impression about that pencil.

Int. 10. How often did you see said Dunton have and use pencils having lead in one end and India rubber in the other end in the wood like Exhibit E?

(Objected to as leading and assuming what the witness has not stated. Question withdrawn.)

Int. 11. How often did you see said Dunton have and use the pencil corresponding to Exhibit E, as stated in your last answer?

(Same objection, and as not in rebuttal, and as relating to
708 alleged prior knowledge of the use of the plaintiff's invention by a person whose name is not given in the answer.)

Ans. Often, during the two or three months I was there.

Int. 12. How did he use it?

(Same objection, except as to the objection of leading.)

Ans. I think in cutting letters, drawing flowers, and so on. He would use one end for strokes and drawing, and turn up the other end for the purpose of softening the shade.

Int. 13. State what the fact was with relation to his said use of said pencil being open to the observation of any persons who might be in his rooms or otherwise?

(Same objection.)

Ans. Whenever I saw them they were lying on his writing-tables, exposed to view and to the use of anybody who used the stationery upon his tables. I have seen him use them. I don't know whether I ever saw anybody else use them. I know I have taken them up and used them myself. I should think it very strange if I had not.

Int. 14. State the fact as to whether, when you saw said Dunton so using the said pencil, anybody else who might have been present in his rooms could or would not also have seen him using them?

(Same objection.)

Ans. If I understand that question, it is whether or not I——

(Question repeated.)

Ans. Anybody in his rooms, while he was using them, could have seen them, of course.

Int. 15. To what extent were people accustomed to come into Dunton's said rooms while you were so employed there?

(Same objection.)

709 Ans. I should say from twenty to forty daily. Mostly pupils.

Int. 16. Do you know William M. Scribner?

Ans. I do not.

Int. 17. Did you know of said William M. Scribner being present or in attendance in said Dunton's writing-rooms during the time you were employed there?

(Objected to as incompetent.)

Ans. I do not.

SEPTEMBER 17, 1873, 2 p. m.—Adjournment, by consent, until 3 p. m. same day.

SEPTEMBER 17, 1873—3.45 p. m.

Deposition continued pursuant to adjournment.

Int. 18. Was the lead in the two pencils which you have stated you saw said Dunton have and use, and have described, of the same kind, or otherwise, as the lead in defendant's Exhibit E?

(Same objection as to int. 11.)

Ans. That I can't say. It was black lead in a cedar-pencil.

Int. 19. Both of them had black lead, did they?

(Same objection.)

Ans. They did.

Int. 20. State, if you know, who made those pencils which you have described and saw said Dunton then have and use?

(Same objection.)

Ans. I do not know.

Int. 21. Were you ever informed, and, if so, by whom and when, and what was said?

(Same objection and as hearsay.)

710 Ans. I can't state positively that I ever heard who made them until this week.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. How do you fix the date when you taught at Mr. Dunton's school?

Ans. From the fact that I left the Dover High School in October, 1853, and went into Mr. Dunton's rooms as teacher of book-keeping on coming to Boston.

Cr.-int. 2. Was there anybody else an assistant teacher at Mr. Dunton's school during the time that you were there?

Ans. Yes; a lady, teaching penmanship. I have forgotten her name.

C.-int. 3. Any other person?

Ans. No, sir; there was no one in his employ at that time, that I saw, besides this lady and myself, as his assistants.

Cr.-int. 4. Do you know whether any person, and, if so, who, either preceded or succeeded you as teacher of book-keeping in his school?

Ans. I do not.

Cr.-int. 5. How do you fix the date when you left?

Ans. I cannot fix it within two weeks. It was some time in January, 1854, when I left. When I left Dunton, I left Boston for Pomeroy, Ohio.

Cr.-int. 6. How long did you remain at Pomeroy, Ohio, and what did you do there?

Ans. I went out to take charge of an academy. I remained until June of that year, as principal of the Pomeroy Academy.

Cr.-int. 7. Did you know Mr. Horton, of Pomeroy?

Ans. I did, sir, very well. He was one of the leading patrons of the school.

Cr.-int. 8. You visited at his house while you were there, did you not?

Ans. Yes, sir.

Cr.-int. 9. How many hours a day did you teach at Mr. Dunton's?

711 Ans. Rather difficult to tell; from seven to nine, I should think. There was three sessions, forenoon, afternoon, and evening. I wasn't actually engaged in teaching, but was there about that number of hours a day.

Cr.-int. 10. Was there more than one room at Mr. Dunton's?

Ans. He had a sleeping-room off from the large room. There was a large room and sleeping-room, where he usually lodged himself, and another room, either with the usual partition or some temporary arrangement where we had female scholars apart from the male. I can't tell whether it was another room or a temporary partition that he put up himself.

Cr.-int. 11. Did you see him making any charts while you were there?

Ans. I remember of seeing charts about. I don't think he was at work upon them while I was there.

Cr.-int. 12. Was he at work upon them while you were there?

Ans. I don't remember that he was.

Cr.-int. 13. Did he use any engraved copy-books while you were there?

Ans. The copies were all written that were in use in his rooms at that time. I think he had a set of copy-books out; but the copies in use in his rooms were set every day for the pupils.

Cr.-int. 14. Was he at work on the engraved copy-books while you were there?

Ans. I don't remember that he was.

Cr.-int. 15. Or upon the engraver's copy for such books?

Ans. I don't remember that he was.

Cr.-int. 16. Please look at the exhibits you have already inspected, and state whether you saw him use any of those implements, or implements substantially the same as those, besides the exhibits you have already mentioned?

(Said exhibits shown witness.)

Ans. I should say not.

712 Cr.-int. 17. Did you ever see him mark any cards while there?

Ans. Yes, sir.

Cr.-int. 18. Did you ever see him mark any enameled cards?

Ans. Well, I don't know what enameled cards are sufficiently to indicate whether those he marked were those or not.

Cr.-int. 19. Did you ever see him use a style in card-making?

Ans. Don't know what a style is.

Cr.-int. 20. Do you remember any particular occasion, and, if so, state it, when you saw him use a pencil with rubber in the end, as you have stated?

Ans. No particular occasion that I remember, but frequently saw him do it.

Cr.-int. 21. When did you next see him after you left in January, 1854?

Ans. Six or eight years afterward, I met on the street in New York.

Cr.-int. 22. When did you first mention to any person the fact of your having seen him use such pencils?

Ans. I should think it might be, perhaps, April last I met Mr. Dunton, and he asked me if I remembered having seen him use such a pencil, and I told him I did. This last April of 1873.

Cr.-int. 23. Where was that?

Ans. In Tremont street, in this city.

Cr.-int. 24. Do you remember how early in April?

Ans. I can't tell, sir; I remember it was very cold at the time; we had a very severe April here; my impression is it was near the latter part of April.

Cr.-int. 25. Whereabouts in Tremont street did that interview occur?

Ans. Somewhere near the Boston Museum; I couldn't fix it more definitely.

Cr.-int. 26. Did Mr. Dunton show you any pencil on that occasion?

Ans. He did show me one after I had told him that I had seen the pencils he spoke of at his rooms.

713 Cr.-int. 27. When did you next speak about having seen said pencils, and to whom?

Ans. Mr. Thacher; some time in the month of June.

Cr.-int. 28. Have you ever made any written statement of the fact of your having seen such pencils?

Ans. I never have.

Cr.-int. 29. Have you spoken to Mr. Dunton on the subject since you met him in Tremont street?

Ans. Yesterday he had a conversation with me in which he spoke of the matter, not me to him.

Cr.-int. 30. What did he say?

Ans. Well, it was wholly of a general nature, not relating in any way to what I might testify to.

Cr.-int. 31. What did he tell you?

Ans. That he first used to make this arrangement of pencils for his own convenience, but afterward he got a man to make them for him, and that the arrangement of the rubber was very fine to meet the requirements of his work.

Cr.-int. 31. Did he tell you how he used to make them?

Ans. I think it's most likely he did, but I felt no interest in the matter, and can't remember distinctly what he said, if anything.

Cr.-int. 32. Did he tell you the name of the man he used to get to make them for him?

Ans. I believe he did, but I can't recall the name.

Cr.-int. 33. Did he tell you where he lived?

Ans. I have an impression that he stated the man had occupied the same stand near by here, for a good many years.

Cr.-int. 34. Can you describe any other implements you saw him use while you were with him?

Ans. I don't think I ever saw him use any but pens and pencils; the usual stationery that other people use.

Cr.-int. 35. Have you been an instructor in writing yourself?

Ans. No, sir.

Cr.-int. 36. Have you ever seen any similar pencils with rubber in the end to those you saw Mr. Dunton have, at any other time and place before to-day?

714 Ans. I never have, with the single exception of one Mr. Dunton shew'me.

Cr.-int. 37. Have you been constantly engaged in teaching since 1854?

Ans. I have, with the exception of two periods, between 1862 and 1864, and 1870 and the present time.

Cr.-int. 38. What branches have you taught?

Ans. Latin, Greek, geometry, algebra, arithmetic, trigonometry, surveying, &c., and the ordinary English branches; and sometimes physics, some of the highest branches.

Cr.-int. 39. What branches are under your charge at the English high school?

Ans. French, English literature, geometry, tri'onometry.

Cr.-int. 40. Have you been principal of a number of schools?

Ans. Yes, sir.

Cr.-int. 41. Have writing, drawing, and book-keeping been taught the

scholars under your charge pretty constantly during the period you have been engaged as a teacher, as principal or otherwise?

Ans. They have.

Cr.-int. 42. Have you seen the various implements employed where instruction is given in those branches, and are you familiar with them?

Ans. Well, I presume I must have seen all the implements that are ordinarily used.

Cr.-int. 43. How long were you with Mr. Dunton yesterday?

Ans. I was waiting in Mr. Crocker's office, up-stairs. Mr. Dunton came up with another gentleman, and, I presume, I was in the room with him an hour on the whole.

Cr.-int. 44. Were other witnesses in this cause in waiting at the same room?

Ans. I think Mr. Dunton came in with Mr. Matthews, who was said to be a witness. I think he was called down while I was there.

Cr.-int. 45. Was Mr. Matthews the only witness that you know of that was there?

715 Ans. He was.

Cr.-int. 46. Did you see Mr. Dunton at any other place than that room yesterday?

Ans. Yes; I saw him at the doorway.

Cr.-int. 47. Did you walk with him in the street yesterday?

Ans. I did.

DANIEL O. QUIMBY.

Sworn and subscribed before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 17, 1873.

(Same notice as to striking out as in previous depositions.)

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of JAMES H. WHITE, taken on behalf of the defendant, at Boston, Mass., Sept. 18, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., and answers of the witness thereto.

Int. 1. Please state your name, residence, and business.

Ans. James H. White, 59 Court street, musical-instrument maker, player, and teacher.

716 Int. 2. State whether you know Alvin R. Dunton, writing-master, and, if yes, how long you have known him.

Ans. I have known him about twenty-two years.

Int. 3. Have you ever been acquainted with Daniel Webster, formerly an engraver in this city?

Ans. I have, sir. He occupied my room.

Int. 4. Will you please state the circumstances under which he so occupied your room and the time when he so occupied it?

Ans. He came there in the year 1851. He occupied it as an engraver, card-writing and engraving for stores.

Int. 5. State whether you know of his doing any work for said Dunton, and, if so, when and where, and how it came about, if you know?

(Objected to as not in rebuttal, immaterial, and irrelevant.)

Ans. He done work for A. R. Dunton in my room about a year after he had been there—in 1852. He done engraving of sample-writing, etc., for publication of books. I met Dunton; had some conversation; he spoke of his books and of getting an engraver. I said there was a very fine engraver with me who would be happy to do his work for him; that he was a little dissipated and quite out of work at times, and I proposed that Mr. Dunton should employ him, as he was a very nice engraver, and he complied with my request and came up and saw him.

(Answer further objected to as hearsay.)

Int. 6. Please state whether said Webster was employed at your room in doing engraving for said Dunton, and, if so, when and for how long a time?

(Same objection.)

Ans. Well, I should think he was there; he was engraving for him—doing Dunton's work; he objected to his doing any other work than for Dunton. I should think he was at work for him some four or five
717 months; the time was somewhat undecided how long he engraved. He was there most every day and Dunton was there with him. He made the time much longer, as he was away some time on sprees. He was there about 1852, I should think. I am sure it was. It was in warm weather, sir, when Dunton came—I should think about September or October.

Int. 7. What was Dunton doing there?

(Same objection.)

Ans. He was writing samples of those copies, and when he was not doing that he was writing cards, fancy cards, at my desk constantly.

Int. 8. What did he write his copies with?

(Same objection.)

Ans. Those for transferring were written with red chalk and water—dissolved in water.

Int. 9. Did you notice, so as to be able now to state from recollection, any implements which he used in doing the card-work or other work? If so, please state.

(Same objection.)

Ans. I should. The cards were usually written with silver-pointed pencil and lead-pencil. The finer writing was with a silver point. For the erasing of incorrect lines, in distancing letters, he would annoy me very much by asking how it was; he would use rubber inserted in pencils, which I done for him.

Int. 10. Please describe particularly the eraser-pencils you speak of, and if you say you made them, state how, and how many you made?

(Same objection, and as relating to a prior knowledge of a person not mentioned in the answer.)

Ans. The larger pencils were used by carpenters. Those, I sawed them half down and separated them, and took out the lead and inserted rubber. The smaller pencils were usually lead in only one end.
718 Those I had to cut and open, cutting out a cavity and inserting rubber, then gluing the wood back again over the rubber. Well, I should think I may have made perhaps a dozen each—a dozen of the large and a dozen of the small.

Int. 11. Have you at my request made lately a specimen of one or both kinds? If so, please produce them.

(Some objection.)

Ans. I put the rubber into one, a carpenter's pencil, and one common pencil—by request. I haven't them with me, I didn't think of it when I came. I can get them, sir, if you would like to have them; my office is just across the square.

(Witness here goes out, and on his return produces two pencil-erasers offered in evidence, and identified by the magistrate as defendant's Exhibits RR and SS.)

Int. 12. State when you made those pencil-erasers.

(Same objection.)

Ans. Tuesday, of this week.

Int. 13. During what time did you make the dozen or so of each kind of these erasers as you have stated?

(Same objection.)

Ans. I should think in September, 1852.

Int. 14. Did you see said Dunton use pencil-erasers so made by you; and, if so, for what purpose, and to what extent?

(Same objection.)

Ans. I saw him use them at my desk for erasing incorrect lines, and giving better distances of letters. I often saw him using the pencils for shading the figures, and perfecting the colors on ornamental cards. He would often call my attention to them.

Int. 15. What was said Dunton employed about at your rooms during those four or five months, and how much of the time was he there?

719 Ans. Well, a great portion of the time he was there, writing his copies, correcting his copies, and overseeing the engraving.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Where was your place of business in the years 1851 and 1852?

Ans. I was at 59 Court street. I went there June 14, 1843, thirty years ago.

Cr.-int. 2. How much of the building, 59 Court street, did you then occupy?

Ans. One office in the third story, room 6; only one room, one desk, no partition.

Cr.-int. 3. Is Mr. Webster dead or living?

Ans. I heard of his death three years ago—as being dead three years ago.

Cr.-int. 4. When did you last see him?

Ans. I haven't seen him for eighteen years.

Cr.-int. 5. When did he leave your room?

Ans. He left in 1852.

Cr.-int. 6. And is that the last you have seen of him?

Ans. I only saw him two or three times after that.

Cr.-int. 7. Do you know where he went when he left your room?

Ans. I don't know his location, but I knew him to be in State street, and he told me he was with Dunton, engraving.

Cr.-int. 8. Do you remember when he first came to your room, what month?

Ans. I think it was the fall of 1851. Month I can't remember.

Cr.-int. 9. How long did he remain at your room altogether?

Ans. He left in 1852, I think early in the winter.

Cr.-int. 10. Did you ever make any of the pencils with rubber inserted for Mr. Dunton at any other time than when Mr. Webster was with you besides the two you have already produced?

720 Ans. I made them while Webster was there engraving in my room.

(Question repeated.)

Ans. I never did. I made all in my room that I ever did, besides these two.

Cr.-int 11. Did you make them all at one time?

Ans. I did not. I made them as he would require them, at different times.

Cr.-int. 12. Do you remember what kind of copies Dunton prepared at your room?

Ans. They were writing-books for schools—educational writing-books.

Cr.-int. 13. Were all the copies that he prepared in your room, so far as you remember, of that description?

Ans. I think the great portion of them were for school use. They varied very much in copy. The first were easy, and they were progressive. I can't recollect whether they were all the same size.

Cr.-int. 14. Did you see him make any copies intended for charts?

Ans. Don't remember that I did.

Cr.-int. 15. How long had you known Mr. Dunton, previously to 1852?

Ans. I think a couple of years.

Cr.-int. 16. Where had you known him during that time?

Ans. In Boston.

Cr.-int. 17. Had you never seen him anywhere else than in Boston, prior to 1852?

Ans. Never any other place.

Cr.-int. 18. What was he doing for the two years prior to 1852, so far as you know?

Ans. The first I knew of his occupation was of his getting up these books and engraving when I introduced him into my room. Before that I didn't know of his profession, except that he was a writing-master.

Cr.-int. 19. How did you first form Mr. Dunton's acquaintance?

Ans. By an introduction. The peculiarity of the man, you would always know him when you met him.

721 Cr.-int. 20. Do you remember, with any particularity, the circumstances of your first introduction to him?

Ans. I do not.

Cr.-int. 21. Do you remember how often you had seen him, prior to your speaking to him about Webster?

Ans. I may have seen him three or four times.

Cr.-int. 22. Did he continue to come to your rooms after Webster left?

Ans. Occasionally.

Cr.-int. 23. How long did these occasional visits continue?

Ans. Well, he has always been in my room, perhaps once a year or so, whenever he is in town.

Cr.-int. 24. Have you ever seen him write or draw since he made the engraver's copies, that you remember?

Ans. He has occasionally written in my room when he has come there.

Cr.-int. 25. Have you ever seen him use pencils with rubber in the end since he made the copies you have mentioned?

Ans. I never have.

Cr.-int. 26. When was your attention first called to the fact that you made the pencils, as you have stated, with reference to your testifying to the fact?

Ans. I had a call from Mr. Dunton; I should think it was ten or twelve days ago.

Cr.-int. 27. What did he state at that interview?

Ans. He asked me if I remembered of inserting rubber in the pencils, and I said I did, perfectly well; and picking up a little saw that I used thirty years ago, I said, "There's the very saw that I cut the pencils with;" and I showed him the gouge that I inserted the rubber with in the small ones.

Cr.-int. 28. When had you seen Mr. Dunton last preceding the interview just described?

Ans. I should think I saw him; I passed him twice in Tremont street within two months.

Cr.-int. 29. Had you ever mentioned the fact of your inserting the rubber to any other person prior to Mr. Dunton's call upon you ten days ago?

722 Ans. I never have.

Cr.-int. 30. Have you been in this city, at your place of business, continuously for the past year?

Ans. I have.

JAMES H. WHITE.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 18, 1873.

(Same notice as to striking out repeated.)

Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of JAMES H. WHITE, taken on behalf of the defendant, at Boston, Mass., Sept. 19, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. James H. White, musical-instrument maker and teacher, 59 Court street, Boston; am a member of the "Germania" Band; have been for twenty years; for seven years before that, with Kendall's Band; formerly led the orchestra at the old Tremont Theatre.

723 Int. 2. Are you the same person who testified in this case yesterday?

Ans. I am, sir.

Int. 3. State whether, after your testimony was finished yesterday, I made a request of you; and, if so, what it was, and what, if anything, you did in consequence.

Ans. I was requested to look in my room for pencils or anything concerning the affair. I did so, and found an old pencil, also some copies prepared for transferring for engraving.

(Answer objected to as not in rebuttal, immaterial, and irrelevant, and relating to alleged prior knowledge of a person not named in the answer.)

Int. 4. Will you please produce said pencil so found, state where you found it, by whom it was made, and when?

(Same objection.)

Ans. (A pencil produced, which has been identified by the magistrate as defendant's Exhibit U U.) I put the rubber into that pencil in 1852. I found it in a set of old drawers—bureau-drawers. I have used the pencil considerable myself in fitting double-bass bridges. I used the lead, rubbing it on to the double-bass, and then rubbing the bridge over it, taking an impression of where it touched, and so fitting it. I did not use the rubber at all.

(Defendant's counsel here offers said Exhibit U U in evidence.

Same objection.)

Int. 5. Where are the bureau-drawers in which you found said pencil, and where have they been since 1852?

Same objection.)

724 Ans. They have been in my room about fifteen years. I bought them of a gentleman who broke up his office. They have been in my room ever since, at 59 Court street.

Int. 6. Has said pencil or pencil-eraser been in your possession ever since you put the rubber in, as stated, in 1852?

(Same objection.)

Ans. It has.

Int. 7. State whether or not said pencil-eraser is one of those which you testified yesterday you made in 1852 at the request of said Dunton.

(Same objection.)

Ans. It is.

JAMES H. WHITE.

(No cross-examination.)

Sworn to and subscribed before me.

F. DODGE,
Examiner.

BOSTON, *Sept.* 15, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of JOHN S. WASHBURN, taken on behalf of the defendant, at Boston, Mass., Sept. 18, 1873, before F. Dodge, special examiner.

725 Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. John S. Washburn, New York City; 41 years; attorney and counsellor at law; am solicitor and counsel for respondent in this suit.

Int. 2. Please state whether you at any time received from our firm, associate counsel with you in this case, any specimen pencil-erasers; and, if so, please state under what cicumstances they were received, and what they were; state fully.

Ans. I did. On the 14th of February last, I think it was, I received the two specimens which I now produce. I think in the same letter

was also another specimen of a different kind, which was afterwards put into the case as dependant's Exhibit K. Afterward, while complainant's testimony in reply was being taken at the Parker House, Boston, and while Edwin W. Gay was under examination, I received two specimen pencil-erasers and one pencil, two of them from Mr. Peter Thacher, and one from Mr. Stephen Thacher. The pencil was stamped "J. K. Herrick & Co." and I put it into the case as defendant's Exhibit K K. I now produce the two pencil-erasers, which have been in my possession ever since, one of them being made of a pencil stamped "Herrick and Blunt" on one side, and "Rhodes and Sons" on the other, and the other being a plain pencil unstamped.

(The four pencil-erasers above produced by witness have been respectively, and in the order they are above mentioned, identified by the magistrate as defendant's Exhibits NN, OO, PP, and QQ.)

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 11. The two specimens which you received on the 14th of February were Exhibits NN and OO?

726 Ans. Yes.

Cr.-int. 12. And Exhibits PP and QQ are two of the three received by you at the Parker House, while Edwin W. Gay was under examination?

Yes.

Cr.-int. 13. Do you remember which Mr. Peter Thacher gave you, and which Mr. Stephen Thacher?

Ans. I am not sure; they were given to me at about the same time; I think the one received from Stephen Thacher was handed to me a short time after Mr. Peter Thacher had given me the other two, and which, at the time, I was holding in my hand, enclosed in an envelope.

JOHN S. WASHBURN.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 18, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of GEORGE H. BUNDY, taken on behalf of the defendant, at Boston, Mass., Sept. 18th, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

727 Ans. George H. Bundy; age, 50; Boston; in the hotel business; keep the Warwick House, 1028 Washington street, Boston.

Int. 2. Do you know A. R. Dunton, teacher of penmanship? If so, how long have you known him?

Ans. Known him since 1852.

Int. 3. Please state the circumstances under which you became acquainted with him, and when it was?

Ans. I knew him when he was teaching writing and penmanship. He was keeping a writing-school, at the corner of Summer and Washington streets, and book-keeping establishment. I went there to learn the theory of book-keeping; was there a while; the teacher of book-keeping left, and I took charge of the book-keeping department.

Int. 4. State when it was that you commenced going to his school, and how long you continued there, either as pupil or teacher.

Ans. Well, I should think it was in the spring or winter of 1853—January or February—that I commenced going there, and I continued some six or eight weeks off and on.

Int. 5. Who taught book-keeping when you went there?

Ans. Mr. Perkins; he came from Montreal.

Int. 6. State whether Perkins continued there while you were there; if not, who took his place; if you say you yourself did, state how long you occupied such place.

Ans. I should think four or five weeks; he was there while I was there; after that I took his place and continued on, I should think, three or four weeks.

Int. 7. Do you know William M. Scribner; and, if so, was he there any part of the time you were there? If yes, what time?

Ans. He was there off and on, I couldn't tell you how much. Not regularly. I understood he had a writing-school out of town that he was teaching.

Int. 8. While you were with Mr. Dunton, as stated, did you see him write and draw? If so, how much, and to what extent?

(Objected to as not rebuttal and immaterial.)

728 Ans. Oh, I couldn't say how much, off and on, as a man naturally would. He was teaching there and I would look on and see him. He had some tables similar to this, and some were writing-desks, set round for the scholars to write and draw upon.

Int. 9. Please describe any implements you may have seen him use in writing and drawing, besides common pens, if any?

(Same objection.)

Ans. Pencils, pens, he used that he had for his use there. One that he had for an eraser had rubber in one end. The eraser was a simple thing. I spoke of it one day, and asked him what that was. He said, "That's something of my getting up." It had *pencil* in one end and lead in the other; something that I hadn't seen before.

(Answer further objected to, as relating to prior knowledge of the invention by a person not mentioned in the answer.)

Int. 10. Please state in what way the rubber was in one end of the pencil.

(Same objection as to last int. and ans.)

Ans. It was in similar to a pencil-point. I didn't see it put in, but it was there, and he used it, sharpened off to a pencil-point, same as a pencil was.

Cr. int. 11. By "pencil-point," do you mean the lead of the pencil sharpened?

(Same objection.)

Ans. The lead was sharpened, and the other end was sharpened like the lead, and he used it, changing side, if he happened to draw a line too heavy, to erase.

Int. 12. How many of such pencil-erasers did you see while you were employed in Dunton's writing-rooms, as stated?

729 (Same objection.)

Ans. I don't know that I see more than one or two that I noticed;

there was others round there, but they didn't come within my use or observation. Don't know whether he had any more or not.

Int. 13. At the time you had the talk with him, as stated, when he said they were of his getting up, did you or not take the pencil-eraser into your hand?

(Same objection.)

Ans. I'm not positive whether I did or not. I know he held it up and I looked at it. I thought it was of little consequence, but he seemed to think it was quite a thing.

Int. 14. Will you now describe the manner in which and the purposes for which you saw him use such pencil-erasers?

(Same objection.)

Ans. I saw him use them when he was drawing; if he drew anything too heavy, he would turn the pencil and use the other end. I asked him what he was doing, and he said to erase the lead. I used to notice particularly when I saw any of his drawings, when he was drawing anything very fine, that he would use this pencil.

Int. 15. Please look at the pencil-eraser now shown you, being defendant's Exhibit QQ, and state how pencil-eraser you saw in Dunton's rooms compared therewith?

(Same objection.)

Ans. They were similar to that—not so well made. Some I noticed had a little string round the end to keep them together. Not so well made as that—commoner.

Cross-interrogatories de bene by E. Wetmore, esq., complainant, and answers of witness thereto:

Cr.-int. 1. Where did you reside in 1853?

730 Ans. In Boston. I boarded up here on Beacon street, opposite Bulfinch street.

Cr.-int. 2. Where was Mr. Dunton teaching when you first went there?

Ans. He was teaching there in that building. He also had schools outside in East Boston, South Boston, and Jamaica Plain, where he would go to teach writing. I think he had one in Roxbury. Those were evening-schools mostly. I don't know but he had some in the daytime.

Cr.-int. 3. How many rooms did he occupy?

Ans. I think there was but one large room; but there was a partition half-way up, dividing the boys' department from the girls'. The classes would pass around these screens. Out of the large room there was a small one, used for a closet or something of the kind.

Cr.-int. 4. When did you leave?

Ans. I couldn't tell the exact time. I left that spring, in 1853. I didn't stay a great while, as I didn't make that my business.

Cr.-int. 5. How long had you been there before you began to teach?

Ans. I hadn't been there but about three weeks when I assisted Mr. Perkins.

Cr.-int. 6. How many hours a day were you there?

Ans. Well, some days I was there six or eight hours a day. Some days, perhaps, not more than five.

Cr.-int. 7. Did you take any writing-lessons while there?

Ans. No, sir. I was out of business that winter, and went there to learn the theory of book-keeping—some new system they had got up. I got assisting Mr. Perkins; finally he left, and I took his place for a while to accommodate Mr. Dunton.

Cr.-int. 8. How do you fix the date when you first went there?

Ans. Well, I know that I was out of business that winter, and that I went there that winter. I know what I was doing before that, and what I was doing after. I was boarding then on Beacon street, at Mrs. Roberts'.

731 Cr.-int. 9. What were you doing before and what were you doing after?

Ans. Before that I was in the West India business, down on Blackstone street—Tyler and Bundy. I sold out that fall. The spring afterwards I went down to Hull here and leased that Mansion House, and kept that.

Cr.-int. 10. How long after you sold out that you went to Mr. Dunton's?

Ans. Oh, it was a good while. It must have been January or February I went there. I can't tell the exact month, but I should think it was the last of January.

Cr.-int. 11. What date did you lease the Mansion House at Hull?

Ans. I can't tell the exact date. I could tell the day the lease commenced. We were talking about it all the spring, and I had to refurnish it and build a new piece on; but the lease didn't actually commence till the 10th of May, I think—10th or 12th.

Cr.-int. 12. How long did your previous negotiations about the lease and building last?

Ans. I couldn't tell exactly. We were talking about the lease, and finally gave it up once. Then we got a reduction on the rent and took it; think it was in March we first began to talk about it.

Cr.-int. 13. Were you at Dunton's when you first began to talk about it?

Ans. Yes, sir, I think I was; but I'm not quite positive when I was there. I was doing a little book-keeping down in Congress street for a man named Blass, and I know I was talking about it while I was there. I was back and forth between there and Dunton's all that spring. I know I took a boy from Dunton's down there once. It was all that spring that we were talking.

Cr.-int. 14. Look at the exhibits which the magistrate will show to you, and state whether you find among them any substantially the same as the one you state you saw in Dunton's possession in 1853, besides the one, Exhibit QQ, you have already testified to?

(All said exhibits, as shown to witnesses above, are here handed the witness.)

732 Ans. The pencils didn't seem made up; he seemed to make them himself. These seem to be made perfectly. His had the appearance of being split at one end, where the rubber was put in. I didn't see him put it in; it was there, that's all I know of it.

(Question repeated.)

Ans. I don't know if they are. I didn't examine the pencil definitely. I considered it of no consequence, and paid very little attention to it. He seemed to think it a great thing. Here is a pencil something like one he used. (Exhibit DD selected.) That comes the nearest of any one here, but it is a different stock. His were longer; the same kind as these here, Exhibits QQ, PP.

(Question repeated.)

Ans. I don't find any here substantially the same. I couldn't swear whether they were or not; it's a long while ago.

Cr.-int. 15. Did you ever see Mr. Dunton mark cards while you were there?

Ans. Yes, sir.
Cr.-int. 16. Enameled cards?
Ans. Yes, sir.
Cr.-int. 17. What did he mark them with?
Ans. He had a silver lead-pencil. I don't know whether he always used that. I've seen him write them with pen and ink.
Cr.-int. 18. When did you next see him after you left his school?
Ans. I think I see him that spring, occasionally. I used to meet him in the street; have done so from that time to this. There was a number of years that I didn't see him at all—didn't know where he was.
Cr.-int. 19. How long did you remain at the Mansion House in Hull?
Ans. Staid there till September; then I shut up the house and stored the furniture; used to go down once in a while to look after it.
733 Cr.-int. 20. How long did you remain here then?
Ans. Till next spring.
Cr.-int. 21. Where did you go then?
Ans. Leased the Old Colony House at Hingham that spring, sold out at Hull, and went to Hingham that summer.
Cr.-int. 22. How long did you keep the house at Hingham?
Ans. About one year.
Cr.-int. 23. Where did you next go?
Ans. To Quincy, out here, and bought out George French, who went to Chicago.
Cr.-int. 24. What was the name of that house?
Ans. Hancock House.
Cr.-int. 25. How long did you stay there?
Ans. Most three years.
Cr.-int. 26. What year did you leave?
Ans. In 1857. While there I bought out Stackpole down here in Milk street, and kept them both a while, and finally I sold them both and went to Chicago.
Cr.-int. 27. Where did you go in Chicago?
Ans. I was travelling that fall, attending State fairs. I went from here to Bradford, Upper Canada, and from there to Chicago; thence to Janesville, Illinois, and all down through that country.
Cr.-int. 28. What were you doing at State fairs?
Ans. I had a patent I was exhibiting.
Cr.-int. 29. How long were you engaged in that business?
Ans. About two months, I think.
Cr.-int. 30. Where did you go next?
Ans. I was there in Chicago at the time of the great failures there, in the fall of 1857. I got short and borrowed ten dollars and came home to Boston; borrowed some more money the day I got back, went and hired the Tremont rooms, opposite the Tremont House, and kept them there for a while.

SEPT. 18th, 1873—2 p. m.—Adjourned by consent until 3 p. m., same day.

734 Examination continued, pursuant to adjournment:
Cr.-int. 31. How long did you keep the Tremont rooms?
Ans. I kept them over a year.
Cr.-int. 32. Where did you go from there?
Ans. Spring Hotel, Watertown.
Cr.-int. 33. Have you kept any hotel in Boston from that time until you began to keep the Warwick House?

Ans. No, sir, I have not.

Cr.-int. 34. How long have you had the Warwick House?

Ans. I went in there June 14th, 1873.

Cr.-int. 35. Who first spoke to you about having seen Mr. Dunton have the pencil you have mentioned, and when?

Ans. I met Mr. Dunton some time—perhaps two months ago, on the street, and was walking along with him, and we got talking, and he spoke of this pencil—asked me if I remembered it, and I told him I did. He didn't tell me then that there was any question about it.

Cr.-int. 36. Did your whole conversation on that occasion take place in the street?

Ans. Yes, sir. I didn't see him but a very few moments.

Cr.-int. 37. Do you know where he was then living?

Ans. Only from what he said. He said he was living down east—in Main' somewhere.

Cr.-int. 38. When did he next speak to you about it, if at all?

Ans. He has been up to the house once since, and talked about it then.

Cr.-int. 39. When next did he speak to you about it, if at all?

Ans. A few days ago. I met him here at the door. We just spoke of it; he has two or three times since. I told him I knew very little about it.

Cr.-int. 40. Had you ever mentioned the subject to anybody else before Dunton spoke to you about it on the street?

735 Ans. No, sir; none to my knowledge.

G. H. BUNDY.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 18, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBEBHARD FABER. } In equity.

The deposition of John M. Whittemore, taken on behalf of the defendant, at Boston, Mass., Sept. 18, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thatcher, esq., for defendant, and answers of witness thereto.

Int. 1. Please state your name, age, residence, and business.

Ans. John M. Whittemore; 53; Wollaston, part of Quincy, Mass.; stationer.

Int. 2. You are the same John M. Whittemore, are you not, of the old firm of Tappen & Whittemore, who gave a former deposition in this case?

A. Yes, sir.

Int. 3. Please state whether your firm of Tappan & Whittemore published a chart prepared by A. R. Dunton, being defendant's Exhibit O, now shown you, and whether said exhibit is that chart, and when it was published.

736 (Objected to as not in rebuttal, immaterial, and irrelevant.)

Ans. They did publish the chart, and this is it. It was published in 1852.

Int. 4. Did your firm take out a copyright of said chart, [same objection,] and is that a certificate thereof?

(Same objection.)

Ans. They did. This is a certificate thereof.

(The certificate here produced is offered in evidence, and has been identified by the magistrate as defendant's Exhibit T T.)

(Said exhibit objected to as incompetent, not being a certificate by the proper officer. Objection withdrawn.)

Int. 5. Have your firm, at any time, published a series of writing or copy books prepared by said Dunton?

(Same objection as to 3d.)

Ans. They have.

Int. 6. When did you first publish said series, and was it before or after the publication of said chart?

(Same objection.)

Ans. The first series was published in 1850, I think 1850 or 1851, before the publication of the chart.

Int. 7. When did you next publish such series of copy or writing books prepared by said Dunton?

(Same objection.)

Ans. We revised the series, and published a knew edition in 1855, I should think; it might have been earlier.

Int. 8. Did you publish copy-books prepared by him in 1852?

(Same objection.)

Ans. We did.

737 Int. 9. Before or after the publication of the chart?

(Same objection.)

Ans. Before.

Int. 10. Do you recollect the time when A. R. Dunton went to Maine last winter, and, if so, did you see him on his return? If yea, state particularly what occurred.

(Same objection.)

Ans. I do recollect of his going to Maine, and I recollect seeing him on his return. He came in, as he always does, and asked me if I had any pencils like one he shew me, or if I could tell him the name of the firm on the pencil. I could not tell him the name of the firm, but referred him to two or three other parties that I thought could give him the information that he wanted—J. L. Fairbanks & Co., Thomas Groom & Co., and Hooper, Lewis & Co.

Int. 11. At the time he showed you the pencil, state what he said, if anything, about it.

(Same objection, and as hearsay.)

Ans. He said it was a pencil that he had found amongst some of his old traps down East.

Int. 12. Did he state where it was found?

(Same objection.)

Ans. At a lady's house, where he was accustomed to stop, in Camden.

Int. 13. Please describe said pencil he then exhibited.

(Same objection as to 3d.)

Ans. A plain cedar pencil, two-thirds the ordinary length, I should say, with the lead in one end and rubber in the other. The mark I recollect of the pencil was, on one side, "Herrick" and a "K" of the name preceding that—No, sir, that name is wrong; it was "Blunt"

738 instead of "Herrick," and a "K" preceding it. I don't recollect

any mark on the other side; did not look at it. The pencil looked as if it had been handled a good deal.

Int. 14. Have you seen that pencil since, and do you think you should recognize it if it were now shown you?

(Same objection.)

Ans. I have not seen it since. I think I should recognize it.

Int. 15. Will you please look at the defendant's exhibits, and, if you find it among them, designate it.

(Same objection.)

(All said defendant's exhibits, including those offered during this examination, shown witness.)

(Exhibit E selected.)

Ans. That is the pencil, I should say, sir.

Int. 16. At the time he exhibited to you the pencil, did he state to you the reason why he wanted to find the name of the firm that manufactured the pencil? If so, what did he say?

(Same objection, and as hearsay.)

Ans. He did. He wished to ascertain the name of the firm to know when it was in existence; said something about its aiding him to establish the date at which he used the pencils.

Int. 17. Do you know Charles A. Evans?

(Same objection.)

Ans. Yes, sir.

Int. 18. If at any time within three or four months, and, if so, when, inquiry has been made of you at your store, by one or more persons, for said Evans, please state the facts and what occurred.

(Same objection.)

739 Ans. In June last, I should say, two gentlemen called at my store and inquired for Mr. Evans. I told them I did not know where he could be found, as he had requested me so to do. I turned and went back to a gentleman in the back part of the store that I was talking with—a Mr. Spaulding. He asked me if I knew those gentlemen; told him I did not. He says, "One of them is a United States detective, or used to be." I said to him, "I think I will give them a little more definite information in regard to their question." I went back to the front part of the store, where they stood talking together after I left them, and told them that upon inquiry of Mr. Clark, of the American Tablet Co., in Brattle st., they could find out Mr. Evans' whereabouts.

Int. 19. Why was that direction given you by Evans, not to state where he was, if inquired for?

Ans. He had just commenced work for these parties, and didn't wish to be interfered with by hangers-on.

Int. 20. At the time Dunton's several series of copy-books and chart, published by you, were engraved, did you employ the engravers, and were you cognizant of the business as it was going on?

(Same objection.)

Ans. We did employ them, in the main. Yes.

Int. 21. Did Mr. Dunton furnish his copies to the engravers in a finished state, or did the engravers find it necessary to perfect them, or have them perfected, before the engraving was done?

(Same objection.)

Ans. He furnished them in a perfect state, so far as my knowledge goes.

Int. 22. What difficulty, if any, did the engravers find in executing the work?

(Same objection.)

Ans. That they were too perfect. It was difficult for them to make their work as perfect as his writing.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of the witness thereto:

740 Cr.-int. 1. Were your firm or firms the exclusive publishers of A. R. Dunton's copy-books and charts from and including the year 1850 to 1860?

Ans. They were.

Cr.-int. 2. Please state what those firms were during the period inquired of.

Ans. Tappan and Whittemore. Whittemore, Niles & Hall.

Cr.-int. 3. Did Whittemore, Niles & Hall publish any, and, if so, which of said books or charts?

Ans. They published the revised series of books only.

Cr.-int. 4. How did the revised differ from the original edition?

Ans. The original were published in this way with slips attached to the covers.

(Defendant's Exhibit L shown, and referred to by witness in this answer.)

Cr.-int. 5. How was the revised edition published?

Ans. With copies at the tops of the pages.

Cr.-int. 6. When were the revised first published?

Ans. About 1855.

Cr.-int. 7. How many different original editions were published in all?

Ans. There was only one original edition. There were four books only in the original edition, constituting the series as far as it went at that time. There were additions made to it afterwards.

Cr.-int. 8. Did the additions consist of new publications of separate books?

Ans. They did.

Cr.-int. 9. When were the first of these additions published?

Ans. I think in 1853 or 1854.

Cr.-int. 10. Were there more than one of such additions?

Ans. More than one book. There were several books added to the series; three, if my memory serves me right.

Cr.-int. 11. These three were published at one time?

Ans. Nearly at one time.

741 Cr.-int. 12. Was there any other additions except the three last mentioned?

Ans. About 1855 the whole series was revised and made new. The old books were abandoned—they reached ten or twelve numbers before we got through with them—the revised series, I mean. There were seven before we revised—before the last revised.

Cr.-int. 13. Did Mr. Dunton make fresh copies for the revised series?

Ans. Yes.

Cr.-int. 14. Where was your store then?

Ans. 114 Washington street.

Cr.-int. 15. Where was Mr. Dunton living then?

Ans. In Boston.

Cr.-int. 16. Do you know where in Boston?

Ans. He lived at different places.

Cr.-int. 17. Was he teaching? If so, where?

Ans. He was teaching part of the time in Boston and part of the time in other places; various places.

Cr.-int. 18. Do you know what those other places were, any of them?

Ans. I recollect New Britain, Ct., Cambridge, Lowell, Lynn, and Salem.

(Further cross-examination postponed by agreement until to-morrow, Sept. 19th, 1873.—Sept. 18th, 6 p. m.)

(Boston, Sept. 19th, deposition of Whittemore continued, pursuant to adjournment.)

Cr.-int. 19. Who engraved the original edition of the copy-books your firm published for A. R. Dunton? By the original edition I mean the first four already referred to by you.

Ans. I am not quite sure, but I think Webster and Swett.

Cr.-int. 20. Did your firm pay for that engraving?

Ans. I think so.

Cr.-int. 21. Who engraved the additional numbers which were added to the series before the revision?

Ans. I think the same parties, but, however, from recollection, I have no other means of knowing at this moment.

742 Cr.-int. 22. Who engraved the revised copies?

Ans. Swett and Boynton. Swett did the most of them.

Cr.-int. 23. How many charts did you publish for Dunton?

Ans. One, I think, only.

Cr.-int. 24. That is the one you have always mentioned?

Ans. Yes, sir.

Cr.-int. 25. Were the additional numbers engraved before or after the chart?

Ans. About the same time. I can't fix that time definitely.

Cr.-int. 26. What copy-books did you publish in 1852, prior to the chart?

Ans. The original four numbers. I don't mean by that that they were made then, but that we were publishing them. I think they were engraved in 1849, as near as I can recollect. We were publishing them all the time.

Cr.-int. 27. I find endorsed on the certificate of copyright put in evidence yesterday a statement that the copyright of seven books was secured in December, 1854. Were these seven books the four of the original series and the three additional series which existed prior to the revision?

Ans. I don't know. I think it must be a portion of the revised series—nothing to do with the old—the original.

Cr.-int. 28. When was the firm of Tappan and Whittemore succeeded by the firm of Whittemore, Niles and Hall?

Ans. In 1855.

Cr.-int. 29. Then, as you have stated that Whittemore, Niles and Hall published the revised series, is it not probable that the memorandum referred to related to the original four with the *the* three additional numbers, which would make seven in all?

Ans. I think not.

Cr.-int. 30. Do you remember whether a copyright was taken out at the time the three additional numbers were published?

743 Ans. I do not. I presume it was.

Cr.-int. 31. Did you see Mr. Dunton prepare any of the original copies or the copy-books or the charts which you published for him?

Ans. I see him at work on them at different times. Never saw him complete anything.

Cr.-int. 32. During the time that the charts or books were in the pro-

cess of engraving, was Mr. Dunton in the habit of visiting your place of business?

Ans. He was.

Cr.-int. 33. How frequently?

Ans. Sometimes daily; sometimes two or three times a day; then, again, not for a week or two.

Additional direct interrogatories by Mr. Washburn, and the answers of witness thereto:

Int. 23. Did you know of Webster's engraving in 1852 Dunton's said copy-books, which you published that year, as you have testified?

(Objected to as leading.)

Ans. I can't fix definitely the time, and am not sure.

Int. 24. Were any or any part of the said books which you published in 1852 engraved subsequently to the original engravings, and, if so, when?

(Same objection.)

Ans. I don't remember.

Additional cross-interrogatories by E. Wetmore, esq., and answers of the witness thereto:

Cr.-int. 34. When Webster and Swett made the engravings, as you think, of the three additional numbers, were they in partnership?

Ans. Not to my knowledge.

Cr.-int. 35. Did they have the same place of business?

Ans. I think not.

JOHN M. WHITTEMORE.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 19, 1873.

744 Mr. Whittemore states that he desires to correct his testimony given yesterday, as follows:

I stated that I thought I commenced to publish Dunton's books as early as 1849 or 1850. I find, upon examination, that 1852 was the earliest of our having any connection with them, and the firm was Tappan and Whittemore at that time. That's all, I believe, the correction I have to make.

Cross-examined by Mr. Wetmore:

Cr.-int. 36. What investigations have you made since your last examination which have brought you to the conclusion in regard to the date that you now express?

Ans. I have examined an old ledger of Tappan and Whittemore.

Cr.-int. 37. Have you the ledger here?

Ans. It is at my store.

Cr.-int. 38. Is that the ledger in which you found the entry of the payment of Tappan and Bradford's bill for engraving?

Ans. The chart, do you mean? Yes.

Cr.-int. 39. Do you find any earlier entries than that?

Ans. I do not.

Cr.-int. 40. Do you find any entries of the payment of Mr. Webster's or Mr. Swett's engraving bills subsequent to that?

Ans. I have not. I haven't looked specially.

Cr.-int. 41. Do you find any earlier entries in the ledger you refer to,

of any kind, relating to the engraving or publishing of any of Mr. A. R. Dunton's books, prior to the entry you have mentioned of the payment of Tappan and Bradford's bill for engraving the chart?

Ans. I do not.

JOHN M. WHITTEMORE.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 20, 1873.

745 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of CYRUS G. SPAULDING, taken on behalf of the defendant, at Boston, Mass., Sept. 18, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto.

Int. 1. Please state your name, age, residence, and business.

Ans. Cyrus G. Spaulding; age, 37; Revere House, Boston, Mass., and cashier of the Revere House.

Int. 2. You are the inventor of an adding-machine, are you not?

Ans. Yes, sir; I am.

Int. 3. Were you at some time this summer, and, if so, when, as nearly as you remember, at the store of Mr. John Whittemore & Co., 116 Washington street, showing Mr. Whittemore your adding-machine? And, if so, state what occurred, if anything, in reference to persons coming into the store and inquiring for Mr. Evans.

(Objected to as immaterial, irrelevant, and not in rebuttal.)

Ans. I was at the store of John M. Whittemore & Co. during the summer, showing my machine. Regarding the exact date, I can't say; about the latter part of June or fore part of July. We were seated at the rear of the store at a desk, and while engaged in conversation
746 two gentlemen came into the store. Mr. Whittemore went to the counter where the gentlemen stood, and had a short interview with them, the nature of which I was too distant to overhear. One of the gentlemen I thought I recognized, and asked Mr. Whittemore if he knew who he was. He said "No;" and I told him I thought him to be one Ahearn, whom I had formerly met with, and whom I believed to be in the Government service at the custom-house as a detective, or in some other capacity. That is the substance of it. I don't think there was any particular conversation ensued, except that Mr. Whittemore said that he might have been a little more particular in his answers had he known who he was.

Int. 4. Who was the name of the man of whom you so spoke—in respect to whom you made such statements to Mr. Whittemore?

(Same objection.)

Ans. Ahearn.

Cross-interrogatories de bene by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. What did Mr. Whittemore think of your adder?
Ans. He seemed to be very much pleased with the machine.

CYRUS G. SPAULDING.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 18, 1873.

747 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of CHARLES A. EVANS, taken on behalf of defendant, at Boston, Mass., September 19th, 1873, before Fred'c Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.
Ans. Charles A. Evans; age 41; Revere, Mass.; lithographer by trade, now engaged in the American Fabric Company.
Int. 2. Are you the same person who has already made a deposition in this suit on behalf of the defendant?
Ans. Yes.
Int. 3. Do you know Silas C. Thomas; and, if so, how long have you known him?
Ans. I was acquainted with him in February last.
Int. 4. Were you present when the deposition of said Thomas was taken on behalf of defendant in this suit last March?
Ans. Yes.
Int. 5. Did you hear said Thomas, at any time prior to his testifying, say anything in relation to the subject; and, if so, when, where, and what did he say?
(Objected to as not in rebuttal, immaterial, and irrelevant.)
Ans. At Mr. Dunton's rooms in March; about, I should judge,
748 perhaps, two weeks before he testified; along in the last of February, I am pretty sure. I heard him say to Mr. A. R. Dunton; A. R. Dunton asked him if he was sure he'd got the date right, the time Thomas made the pencil. He asked him why he was so sure. He said that he had recom'endations given him by Mr. Dunton, over at East Boston, in the Bible; told Mr. Dunton that he would bring it over to him. I was there in Dunton's room next time when he came in. Wiley Dunton's nephew was there at the time, I am pretty sure. He came over and said he'd forgotten it. The next time I was in the room after that, he came in and had a black eye, and said he had forgotten it again. Dunton asked him how he got his black eye. Said he was taking down a bedpost and it fell on to him. I heard Mr. Dunton speak to him again about the recommendation, and he said he had forgotten it each time. Dunton says, "I want you to bring it over, for I want you to get the date right." Thomas said he was certain it was 1856 that Mr. Dunton gave him the recommendation, when he was down East.

Int. 6. Was anything said about said Thomas and Dunton teaching together in Maine; and, if so, what was said?

(Same objection.)

Ans. I don't remember that there was anything.

Int. 7. Did Thomas state why he was certain that the certificate of recommendation from Mr. Dunton was in 1856? If so, what did he say?

(Same objection.)

Ans. He said the recommendation Mr. Dunton gave him was at that date, 1856.

Int. 8. Did he say how he knew that that recommendation was dated in 1856? If so, what did he say?

(Same objection.)

Ans. I don't remember.

Int. 9. Did he say when he had last seen it? If so, what did he say?

(Same objection.)

749 Ans. I don't remember as he said when he last saw it.

Int. 10. Were you present at any conversation with said Thomas after he had testified in relation to this case; and, if so, when, where, and what, if anything, did he say on the subject?

(Same objection.)

Ans. In Mr. Dunton's rooms. Mr. Thomas said that he had dined with the lawyers and the Jew. He said the lawyers on the other side—that's the remark he made—he said they had offered him five hundred dollars to testify on their side. Mr. Wiley spoke up and says to him, he says, "What kind of a damn man are you to testify on one side and turn over to the other side?" He said he didn't care a damn about that, money was what he was after; he also said that he had become acquainted with Mr. Washburn, that he was a mason, and Mr. Wash burn was a mason, and he was going to get money out of him, out of Mr. Washburn. I told him that he'd better do something better than that; he said he probably should. That's about all, I believe.

Int. Are you acquainted with M. J. Ahearn, of Lynn, Mass., now or formerly a detective? And, if so, state the manner in which you became acquainted with him, detailing how it came about; and state when and where, and what occurred, if anything, between you.

(Same objection.)

Ans. I am. There was two men called at 116 Washington street—J. M. Whittemore's; they enquired for Mr. Evans. Mr. Whittemore said that they could find me out by inquiring at Mr. Clark's on Brattle street, the American Tablet Company. They called at Mr. Clark's and asked to see Mr. Evans. He said they couldn't see me that day, because I was employed by him experimenting, but could see me the next day at one o'clock, at Brattle street. Mr. Clark came down to 26½ Portland street, where I was employed by him; told me there was two parties wanted to see me very much. Mr. Clark said he told them I could see

750 them the next noon at one o'clock. When I went out for my dinner I went up to Mr. Whittemore's. I asked him who the parties were. He said he didn't know, but there was a gentleman in there that did know one of the men, and said it was a United States detective. I said I couldn't imagine what the United States detective wanted of me. The next day at one o'clock, or soon after one, I called at Mr. Clark's, on Brattle street. He said one of the men had been there and gone, and wanted me to call immediately at No. 5 Tremont street. I went up to No. 5, one flight of stairs, to the door at the right of the stairs. I asked, "Who is there here to see Mr. Evans?" A man, sitting a little inside of the door, part way through the room, says, "I want to see Mr.

Evans." Took hold of my coat and led me out into the entry at the head of the stairs. He says, "I want to see you in regard to a pencil-eraser." I asked him what he wanted. He said he wanted me to testify. I told him that I had done already. He says, "You wouldn't like to see a poor man ruined," he says. I asked him what he meant by that. "Well," he says, "the man that owns the patent-right of the pencil-eraser." I said, "If anybody owns that, Mr. Dunton owns it." "Well," he says, "you don't know what I am driving at." He says, "I want to have a long talk with you. I want to stay two or three or four hours." He then asked me if I'd been to dinner. I told him I had. We started down the stairs together; walked down Tremont street together—Tremont row, at least—down towards Hanover street. He said again, he wanted me to testify about the pencil. I says, "I have already," as I said before. He says, "You don't know what I'm driving at." I says, "I think I do, pretty well." He says—he took his book out of his pocket—"I've got money," he says, "and I'm going to give money if you'll testify against Dunton's character." He asked me where I lived. I told him I lived in Revere. "Yes," he says, "I know you do." He says, "I live in Chelsea." Asked me if I was acquainted with Mr. Murphy. I said I had seen Mr. Murphy, and was somewhat acquainted with him. He said he knowed the people living around me, where I was living; said
751 they all spoke well of me; said he was coming out to see me on Sunday; that he wanted to spend half a day with me. I said I should be very glad to see my friends at any time. I says to him, "My people are going to Brighton on Sunday, and I may not be at home." He said he should be there on a Sunday—ride out there in a team. He still had the book in his hand. He says to me, "I am going to give money," he says, "and I want you to testify against Mr. Dunton's character." I said I never heard Mr. Dunton's character questioned, and I couldn't testify anything different if he'd give me a million dollars. Those were the words I used—a million dollars, I says. He took my name and said he should come to see me on a Sunday afternoon. That was all.

Int. 12. Who was that man, if you know?

(Same objection.)

Ans. M. J. Ahearn.

Int. 13. How do you know?

Same objection.)

Ans. I called to see him since.

Int. 14. State when, where, and what occurred.

Same objection.)

Ans. Last Tuesday. I saw him at his residence, on Essex street, Lynn. His wife came to the door; said he was just getting up, and invited me up stairs. He came out into the room—I says "good morning"—and he didn't know me, but I recognized him and placed him. I asked him why he didn't call and see me as he had agreed to. He said he didn't think it was required to, as they'd got through taking testimony on the other side, and said he was going away, to be gone about two months and a half, and if he should want me he would come and see me.

Int. 15. State why you went up to see him last Tuesday; and if you were requested to do so, state who requested you.

(Same objection.)

752 Ans. Mr. Washburn wanted me to identify the man. Mr.

Thacher gave me his name, the name of the street, and the number of the house.

Int. 16. When was it that you saw said Ahearn, as you have stated, at No. 5 Tremont street?

(Same objection.)

Ans. Some time the last of June; I should think about the 20th or 25th, somewhere along there—it was in June.

Int. 17. State whether you immediately informed anybody of this occurrence, and said Ahearn's interview with you, and if so, whom you informed.

(Same objection.)

Ans. Young Mr. Thacher, and also Mr. Washburn and Mr. Thacher also, the same day.

Cross-interrogatories by E. Wetmore, esq., for complainant and answers of witness thereto:

Cr.-int. 1. Have you ever had any other conversation with any other person in reference to your last testimony in this case, since you gave it?

Ans. I did; I don't know—I don't remember that I did, and yet I might.

Cr.-int. 3. You produced an entry on your last examination, did you not, purporting to have been made in August, 1855?

Ans. I did.

Cr.-int. 4. Have you ever said anything about that entry since your last examination to any person; if so, when and to whom?

Ans. Not to my knowledge.

Cr.-int. 5. Was that entry, as matter of fact, made over an erasure?

Ans. That entry was made at the date it says. (Question repeated.) I don't understand the question.

Cr.-int. 6. Had there been anything or any marks made where that entry was made, before the entry itself, which had been erased and the entry written over the place where the erasure had been made?

753 Ans. No, sir; not to my knowledge. It was made at that time, and never changed by me. I never made any change.

Cr.-int. 7. Will you swear that, as a matter of fact, that entry is not made over an erasure?

Ans. Not to my knowledge.

Cr.-int. 8. Can you swear whether it is or not?

Ans. I can swear it has never been changed by me since the day it was put there and the book has been in my possession.

CHAS. A. EVANS.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 18, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of AUGUSTUS MEISEL, taken on behalf of the defendant, at Boston, Mass., Sept. 19, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Augustus Meisel; age 49; Boston, Mass.; am a lithographer.

Int. 2. Do you know Alvin R. Dunton, writing-master; if so, how long have you known him?

754 Ans. I do. I have known him since 1857 certainly. I think I knew him two years before that; am not sure.

Int. 3. Did you ever do any work for said Dunton; and if so, when, and what?

Ans. I did, sir. I think in 1857 I made a chart for him—large and small capitals of his writing-books.

Int. 4. Was 1857 the first time that you ever did any work for him?

Ans. I think it was.

Int. 5. Who finished and shaded off the letters in those charts?

Ans. Mr. Dunton made the letters, and from these I copied. I don't know what you mean by finishing them off and shading them. I copied them exactly.

Int. 6. Did Mr. Dunton ever give them to you in the rough, and you then finish them?

Ans. No, sir.

Int. 7. Were his copies ever changed in any way, or required to be finished or touched up when given to you?

Ans. No, sir.

Cross-interrogatories by E. Wetmore, esq., for complainants, and answers of the witness thereto:

Cr.-int. 1. Were the charts you have spoken of like Exhibit O, now shown you?

(Said exhibit shown witness.)

Ans. It was a chart similar to this. It was not like it exactly.

Cr.-int. 2. Did you engrave more than one chart for Mr. Dunton?

Ans. I only engraved one chart for Mr. Dunton. I engraved a small chart for Mr. J. D. Philbrick, superintendent of public schools, and Mr. Dunton furnished the copies. It was published as the Boston Public School Tablet. I think that was in 1858, if I am not mistaken. I can't remember the date. It was not a long time after I made the large chart.

755 I wish to state also that by the date of this chart (Exhibit O) I find that I knew Mr. Dunton more than two years before 1857. I knew him when that chart was made.

And, in stating the work I did for Mr. Dunton, I wish to add that I filled out two or three diplomas for him—he had a lot to fill out for the Charitable Mechanics' Association, and I filled out a few for him, two or three or four; I can't recollect exactly; and then I made a small drawing for him; that's all I recollect. This was done between the time that chart (Exhibit O) was made and the one that I made. The letters with which the diplomas were filled out were not writing-letters.

Additional direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 8. Do you know what engraver or lithographer made this chart, (Exhibit O?)

Ans. Yes, sir. Tappan and Bradford was the firm—L. H. Bradford made the chart.

Int. 9. Did you engrave the diploma and drawing you have referred to exactly according to the copies Dunton gave you?

Ans. No, sir; there was no copy. It was simply written on a piece of paper, the names and business, whatever is usually in a diploma. I did the whole.

Additional cross-interrogatories by E. Wetmore, esq., for complainant, and answers of the witness thereto:

Cr.-int. 3. Do you remember the season of the year it was when you saw that chart (Exhibit O) in process of engraving at Tappan and Bradford's?

Ans. I do not certainly remember, but I know it was warm weather. I do not certainly remember whether it was July, August, or September.

Cr.-int. 4. With what material were the copies of the chart you made written—ink, or what?

Ans. With red chalk, sir.

756 Cr.-int. 5. Do you remember any more nearly the date of filling up the diplomas, except that it was between the time you saw the chart at Tappan and Bradford's and the time you engraved the chart for Mr. Dunton?

Ans. I do not.

Additional direct interrogatories by Mr. Washburn, and answer of witness thereto:

Int. 10. How was the red chalk with which the chart was drawn prepared for use, if you know?

Ans. For the work that he made for me it was simply red chalk. I wish to state here, that for lithographing we used simply red chalk. For engraving and copper-plate they use a preparation of red chalk, and I do not know how that is made.

AUGUSTUS MEISEL.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 19, 1873.

Correction of the testimony of SARAH L. BARBOUR:

The witness, Sarah L. Barbour, having stated, after her examination was closed and the examiner had left the house, that she wished to correct her testimony so that her answer to the 24th interrogatory shall read "up stairs" instead of "the room marked spare bed-room," it is hereby stipulated that the said correction may be made.

Attest:

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 19, 1873.

757 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of CHARLES W. HILL, taken on behalf of the defendant, at Boston, Mass., Sept. 19, 1873, before F. Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Charles W. Hill, Boston, Mass.; 55; rubber business with H. A. Hall, School street—48 School street.

Int. 2. How long have you been employed there?

Ans. About thirteen years.

Int. 3. Do you know Alvin R. Dunton, writing-master; and, if so, how long have you known him?

Ans. Well, sir, I have known him ever since February—the 13th of February, 1873. It was about the middle of February—the 18th to the 20th.

Int. 4. Please state where you then saw said Dunton, and what occurred.

Ans. I saw him at the store of H. A. Hall. He was directed to me by Mr. Hall. Well, he wanted me to examine a pencil he had. I examined it and told him what I thought of it. He likewise showed me a piece of rubber-gum that he had. He asked me the question if it was vulcanized the same as what was attached to the pencil. The pencil had the name of "Rhodes & Sons" on it. There was a piece of
758 vulcanized rubber in one end and lead in the other. I told him at the time that I thought it was an English-made pencil. The pencil was about two-thirds the length of ordinary lead-pencils. There was a "K" on it, where the pencil had been cut away. There had been some name on it, and all that was left was a "K." I don't mean to say that was the only mark there was left on the pencil. There was the name "Rhodes & Sons" stamped on one part of it. Well, as far as conversation goes, there was nothing further than the remarks he made and questions he asked about the rubber. I told him it was vulcanized rubber, the same as what was attached to the pencil. As regards the rubber being vulcanized, Dunton asked how long it was since they had made it. I told him it was some twenty or twenty-three or four years since they commenced making it. I had been working some eighteen years at it myself.

Int. 5. Have you ever seen that pencil which he then showed you since?

Ans. No, sir.

Int. 6. Do you think you would recognize it if you saw it now?

Ans. I may *be* possibly be able to. It is some time since I have seen it.

Int. 7. Please look at defendant's exhibits, which the magistrate will now show you, and if you find that pencil-eraser among them please designate it.

(Defendant's pencil exhibits shown witness, as in deposition of Bundy, supra.)

Ans. I don't know; seems to me that looks the most like it.

(Exhibit E selected.)

CHARLES W. HILL.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

No cross-examination.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, *Sep.* 19, 1873.

759 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of ALVIN R. DUNTON, taken on behalf of the deponent, at Boston, Mass., Sept. 19, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto.

Int. 1. Please state your name, age, residence, and business.

Ans. Alvin R. Dunton; age 59; Camden, Maine; author and teacher of penmanship.

Int. 2. Are you the same Alvin R. Dunton who has previously testified in this case?

Ans. I am.

Int. 3. Will you state where you were and what were your whereabouts in the fall of 1855, in September, October, and November, as particularly as your recollection will enable you so to do?

(Objected to as not in rebuttal, immaterial, and irrelevant.)

Ans. I was in Boston, Chelsea, Providence, New Haven, New Britain; I think in Farmington, near by New Britain, Ct., and in Newburyport; I think in New London and Norwich, and the State of Maine.

Int. 4. After your marriage, (October 8th, 1855,) how much of the time were you in Boston during the months of October and November?

(Same objection.)

760 Ans. I should think not to exceed two weeks.

Int. 5. You spoke of being in the State of Maine. Whither did you go upon leaving the State of Maine?

(Same objection.)

Ans. I went to Newburyport, Mass., from Portland, Maine. I went to Portland from either Camden or Rockland; I am not able to tell which.

Int. 6 How long did you remain in Newburyport, and how were you employed there?

(Same objection.)

Ans. Couldn't say how long I remained there. I had been there previously to my going to Maine. I taught in the public schools and private classes; taught in pretty much all the public and private schools in the place, if not all.

Int. 7. Where did you spend the month of December, 1855?

(Same objection.)

Ans. According to the best of my recollection, I spent it in Newburyport.

Int. 8. Where did you spend the winter of 1856?

(Same objection.)

Ans. Spent the winter in the State of Maine.

Int. 9. I wish you would think of that a moment. I ask you now about January and February, 1856?

(Same objection.)

Ans. I got that mixed. You wish to know where I spent the winter of 1855 and the remainder in 1856. Well, Mrs. Dunton was teaching in Farmington, near New Britain. I went out there, and think I taught in that vicinity, round there in different places.

Int. 10. Was Mrs. Dunton with you in Newburyport at any time?

(Same objection.)

761 Ans. She was. She went to Farmington, and Mr. Chapman came and took her place and taught with me. He came to Newburyport.

Int. 11. Was your wife sick at any time in Newburyport; and, if so, when?

(Same objection.)

Ans. I think about two or three months after our marriage, in 1855—the fall of 1855.

Int. 12. Did she have a miscarriage there?

(Same objection.)

Ans. She did.

Int. 13. Was it before or after that sickness that she went to Farmington and Chapman took her place, as you have stated, at Newburyport?

(Same objection.)

Ans. Afterward.

Int. 14. Can you state now about how late in the year of 1856 you remained at Newburyport teaching, as you have stated?

(Same objection.)

Ans. I don't recollect.

Int. 15. Do you recollect William M. Scribner?

(Same objection.)

Ans. I do.

Int. If you saw him at any time in the year 1855, when was the last time you saw him in that year?

(Same objection.)

Ans. The last of July or the first of August.

Int. 17. What were the circumstances under which you then saw him the last time in that year?

(Same objection.)

762 Ans. I learned from the lithographers that he'd been getting some impressions of my new book. Accordingly I looked for him; found him at Payson and Hanaford's writing and book-keeping academy, on Washington street, copying my work. I took it from him and told him he'd not kept his promise, as he agreed to meet me. He agreed to meet me the next day at Mr. Whittemore's; didn't keep his promise. I saw him on the opposite side of the street' the same day or next day, and went over. While talking with him, Mr. Ainsworth, of the firm then of Crosby, Nichols, and Ainsworth, came along and took hold of him by the arm and passed along—of the present firm of Woodworth, Ainsworth & Co. I asked him to go over to Mr. Whittemore's, which he did with some reluctance. I asked him if he would sign a paper, as he agreed. He said that they had offered more copyright than I had—the other party—and two thousand dollars salary a year. He didn't say whether he would accept it or not, but left. I soon found, by the way that the circulars went, that he'd gone in with the other parties.

Int. 18. Did you at any time during the remainder of the year 1855, and up to Jan. 1, 1856, seek any interviews anywhere with said Scribner?

Ans. I did not.

Int. 19. When next after said interview of the last of July or first of August, 1855, did you see said Scribner, and where?

Ans. I saw him in Brooklyn, N. Y.; can't tell the time. I think it was in the spring or summer of 1857 or 1858.

Int. 20. What then took place?

Ans. I went there to put in my books with Mr. Chapman and Mrs. Dunton. He and Mr. Hayes were there, putting in the opposition—the Crosby, Nichols, and Ainsworth books. He was slandering me, and I saw him and told him I must have no more of it, but he continued in it. I met him on the street, with Mr. Chapman and my wife. He was a little distance and I walked to him. I told him he continued his slander, and I knocked him down.

Int. 21. On what terms have you been with him since?

763 Ans. Never have spoken with him; have met him a number of times.

Int. 22. Had he at any time any interest in any of your copyrights?

Ans. None whatever.

Int. 23. Did you and he at any time use the same trunk?

Ans. Never.

Int. 24. When you were teaching penmanship in Thomaston, Maine, in the spring of 1848, state how much time you spent there and how the school was managed, whether by yourself personally or otherwise.

Ans. I boarded at Rockland and had two schools running at the same time. Spent my nights at Rockland; used to ride over in the evening in my own team. School was managed by myself and Mrs. Dunton, and Mr. Thomas sometimes, while he was with me, used to ride over and assist some. He left soon after the school was gotten up.

Int. 25. When you visited Camden last winter, as testified in your former deposition, state on what day you arrived in Camden, and what time of day, and by what route.

Ans. I went in the cars from here to Portland; went through in the cars to Portland from Boston. I got there to Camden Saturday, about two o'clock in the afternoon; left here on Friday.

Int. 26. State what occurred on Saturday afternoon.

Ans. I called on my brother, Washington Dunton, and told him what I came for—to see if I could find a pencil with rubber on one end, and asked him if he recollected ever seeing me use one, or if he ever had one. I went to Mrs. Thomas'—Rachel B. Thomas'; told her what I came for. I saw she was hard at work; told her she needn't look then; told her I came to see if she'd got a pencil with rubber in the end, and I went down town, and when I came back she gave me two pencils; one had rubber in and the other was a style with a composition

764 in the end of it. I remarked to her that I never saw a person like her; that I never inquired for anything in the house but what she had it. I suppose that Mrs. Barbour heard the conversation; she stood by the sink and her mother stood beside her. I directed my conversation to her mother and her both. That is the reason why I expected to have Mrs. Barbour as a witness in the case, and told Mr. Thomas so here, at Mr. Young's house—Young's hotel.

Int. 27. How long were you absent down town before you came back to Mrs. Thomas', and she handed you two pencils, as you have stated?

Ans. I couldn't say. I called at Mr. Harwood's to see a horse I let him have. About an hour, I should think; perhaps not so long.

Int. 28. Do you recollect the date of your return to Boston?

Ans. 20th of February.

Int. 29. Please state what you did after your return on that day, and the reasons which impelled you to such action.

Ans. I called on my return on Mr. Thacher here, showed him the pencil I got down there, the one with rubber in it, and another one that Mr. Thomas gave me; that he said he made in 1857; I took mine away

with me, telling him I was going to find out whether the firm was on there, a New York firm, existed in 1855. I accordingly called on Mr. Whittemore, and asked if he knew who the firm was; there was "K" on the pencil, and "Blunt" on one side, and "Rhodes and Sons," "New York," on the other; no, "Rhodes and Sons, London," on the other side.

Mr. Whittemore said he didn't know the firm's name, but told me that Mr. Fairbanks could tell. I went in there, and Mr. Tucker looked at it and said it was "Herrick & Blunt" the moment he took it in his hands; I asked if he had any; he said he hadn't, but he said he had Rhodes & Sons'; I asked him if he knew how long these pencils had been in the market with Herrick & Blunt on them; he said it was a pretty old firm; he could tell me, he thought, by his books. He used to have them, and I used to buy them of him; he said
765 he thought I bought 'em of him as far back as 1851 and 1852. I asked him if he knew where I could get them; he told me to go down State street, Mr. Grooms, Hooper & Lewis, and if I didn't find them there, go to Gay's, and he kept the odds and ends of everything in the stationery line. I went to Mr. Grooms and inquired; he hadn't it; don't know whether I showed the pencil there or not; I think I did; I made inquiry. I went to Hooper & Lewis', showed it to him, and asked him if he knew how long it had been made, and if he had any; he took the pencil and carried it, as I thought, up stairs, and was gone a long time with it—I mean the eraser I had brought from Camden. He said he hadn't any; didn't know how long they had been made. Went to Mr. Gay's; found he had some of the same kind; I bought quite a number of articles there; bought one of those pencils, "Herrick & Blunt" on one side, and "Rhodes & Sons, London," on the other. Asked him if he knew how long they'd been made; he said he'd had them in the store twenty-five years. I bought a gross of pens; inquired for Windle's pens, a place I used to trade a good while ago. He said he had some, but couldn't find any. Bought some crow-quills pens of him, Gillotts, a mapping pen, very fine Gillott's pens, and a number of other old articles such as I used to use; got some rubber, a piece he cut off a jug, and a piece he'd had in the store 18 or 20 years I think he said, and I then returned to my room and got something to eat.

Int. 30. Who, if any one, accompanied you on this trip for pencils?

Ans. Mr. Matthews. I don't know his first name. He always goes by the name of "Ren." Lorenzo, I guess it is.

Int. 31. Had you previously shown him said pencil-eraser; if so, when and where?

Ans. When I was going up on the boat, on the 19th day of February, up from Camden—Camden to Boston.

Int 32. Did you state to either of the persons of whom you inquired for said "Herrick and Blunt" and "Rhodes and Sons'" pencils
766 the reasons why you wished to ascertain whether they were in the market in 1855, at the time you were inquiring for said pencils; and, if so, state what you said?

Ans. I spoke about it. Told them that I should find out if these pencils were in the market as far back as 1855; that I supposed I left the pencil in 1855, and that that would strengthen me some in regard to it; I left it there at Camden. I mean, if I found they were in the market in 1855. I knew Rhodes and Sons' pencils were in the market, as I had used them as far back as 1840 and 1841. They were considered the best in the market at that time.

Int. 33. Did you at any time last winter give any directions to any person, and, if so, to whom, for the making of some specimens of pencil-

erasers such as you have testified you used to make and use, and why?

(Objected to as calling for a conclusion and not a fact, and as leading.)

The two last words of question "and why" struck out, and "and how you came to give such direction" substituted.

Ans. I did. To Mr. Wiley—Seldom Wiley—at the request of Mr. Thacher—Peter Thacher.

Int. 34. Did he make any in pursuance of the directions?

Ans. He did.

Int. 35. How many, and what did you do with them, if anything?

Ans. He made two or three at one time; at another time he made two or three, I am not prepared to say which.

Int. 36. What did you do with the first that he made?

Ans. I let Mr. Thacher have them.

Int. . The first that you brought to Mr. Thacher, how many did you leave with him?

(Objected to as leading. Withdrawn.)

Int. 38. Did you leave with Mr. Thacher all that Wiley made first?

767 Ans. I am not able to say whether I took one back or not. I am of the impression that I left two.

Int. 39. Why were any more made after the first?

Ans. Mr. Thacher said he'd sent those to Mr. Washburn, and was anxious to have more made. He spoke to me about it a number of times. He did about the first ones, too, before I made them. I ordered them made; that is, by a man that was with me. I said Mr. Wiley made them; that's understood.

Int. 40. What was done with those that were made after the first?

Ans. Mr. Thacher got them. I don't know whether I brought them here or he called there; not able to tell.

Int. 41. Did you yourself make any pencil-erasers last winter or spring prior to the first time you testified in this case?

Ans. I did not.

Int. 42. Did you cause any to be made by any other person than as you have testified—by Wiley?

Ans. Not to the best of my recollection.

Int. 43. Do you remember having a conversation with Lura C. Thomas, wife of Silas C. Thomas, at his house in East Boston, last spring?

Ans. I do.

Int. 44. Was that before or after you heard that said Thomas was in communication with the complainant's counsel with a view to aiding them?

(Objected to as assuming what is not proved. Withdrawn.)

Int. 45. Were you at any time informed that said Thomas had offered his services to the complainant's counsel?

Ans. I was; but not at that time.

Int. 46. Now, please state what the conversation was with Mrs. Lura C. Thomas.

Ans. Mr. Thomas came to my room a good deal intoxicated, and wanted me to let him have some money, and put up his watch;

768 let me have his watch. I had previously let him have ten dollars and taken his watch. I refused to do so, and he importuned me all the afternoon and evening till ten o'clock that night. Said that he had promised his wife that when he come home he would bring her some money—she required some more—and that they treated him badly at home; his son struck him and broke the bridge of his nose, he said; what he told me previously about it—Mr. Thacher and others—about a

bed-post striking him, was false. He said so much and coaxed me so hard; said that if I'd let him have five dollars he'd let me have his watch, and would seal it up in an envelope, and God might strike him dead if he didn't carry it home to his wife. He put his arms round me and kissed me; got down on his knees. I took a five-dollar bill out; put it into an envelope and sealed it up; put his wife's name on it; turned round to put my envelopes into the drawer, and he started. I hollered to him to stop; but he went down stairs mighty quick. He put his watch back; he had unhooked it to give me. He played it on me that time. I supposed I was sure of his watch. I slipped on my coat, but not my overshoes, and went down stairs as quick as possible. I looked for him; went round to drinking-saloons pretty lively, one after the other. At last I found him. He had the bill changed and spread out on the counter. I collared him at once, and said, "Put up that money; I could tear your heart out; you've been drinking again." He said he hadn't. I found him in the same building where my rooms were. The man who kept it said he had been drinking and hanging round all that day, and he would have kicked him out if he hadn't claimed to be a connection of mine. I stated to them what he'd said to me, and took him in hand to take him home. I got a little ways, and he swore he wouldn't go any further. He took out his knife and opened it. He was determined to ride, and I wouldn't get into a car with him, drunk as he was. I took his knife away and choked him against a building, and he concluded to go. He was mad, too. Before I got to the ferry he would take a crooked path, and persist in it; and, as he got to the bridge, he stopped, and be-
769 gan to pull his boots over his pantaloons, as I thought. I hollered to him to be in a hurry. When we arrived at home his wife was on the bed, and daughter. She got up, and I told him to give her the money. He felt in his pockets and said he hadn't any, only fifty cents. I gave her that and commenced to search. He said he must have lost it in the saloon. A little girl said, "Maybe he's got it in his boots." I found it in his stocking and he started to run. He got into a dark room, and I fetched him out in a hurry. He said he was damn' smart; that he'd learned to hide money; turned it off in that way. Took this money. I took it and gave it to his wife. It was $4.85. He told me before I gave him the money that he didn't have anything in the house to eat. I staid all night. In the morning she, Mrs. Thomas, told me about his treatment to her. He told me, going over that night, about robbing a man at Wilde's hotel of $300; said he left $200 of it with his wife's sister. His wife was then down at Augusta, Me. I asked his wife about that, and she said it was true; that her sister gave it to him to take to the city, and she hid it; that when he went over to the city an officer took him and searched him. She told me in regard to his writing for her to come up from down East, and when she came he was intoxicated, and that he gave her $145 of this money he had robbed the man of; took the other $55 and bought the suit he was then wearing. That she expected every time he came home that he'd be arrested; that she stood in fear all the time; that they came over to the great fire, and he stole any quantity of things; that on crossing the ferry an officer tried to arrest him; that he said he had been burned out, and was going over with his wife to her sister's to stop, and that he'd taken just what he could, and the officer apologized and let him go. She also told me he'd been taken up for drunkenness, and shut up three or four times for abusing her and the family, and the officers had said he would be sent to the Island the next time they took him. She told me about his bad

treatment of her and the family, and about the boy striking him.
770 I told her that the course he was taking, Mr. Thacher said, would destroy his testimony; and I asked her if there was no way to stop his drinking, and she said she didn't know of any. I asked her if she didn't suppose if she could get him out of the city he would stop drinking, and she said no. She said she was very sorry she ever came to Boston; didn't know what she could do. I left the next day.

(Objected to as immaterial and irrelevant.)

(September 19, 1873, 6.45 p. m. Adjournment by consent to 8 p. m. same day.)

(8 p. m. of said September 19th. Deposition continued pursuant to adjournment.)

Int. 47. Had you ever, at any time, after the said conversation which you have related, any other conversation with the said Lura C. Thomas, at her residence in Boston?

Ans. I had one there and one at my room—not at her house.

Int. 48. Do you mean one other besides that at her house?

Ans. Yes; I had one other at her house.

Int. 49. How long was that after the one you have related?

Ans. It was a short time; I went over with Mr. Brandt one evening.

Int. 50. What conversation occurred then with Mrs. Thomas?

Ans. Mr. Brandt requested me to go over there, as he'd seen an article in the paper where two young men, one a well-educated young physician, were arrested, and he supposed one was Thomas. We had some conversation with her; said we supposed one of the men was Thomas; she said it was so; that he got intoxicated the next night, and had been sent down to the Island that day for two months. As we came out we saw the sergeant of the police, and he corroborated her state-
771 ment. No other conversation; there was company there; the conversation was mostly between Mr. Brandt and her.

Int. 51. Please state the conversation you had with her at the other interview at your room.

Ans. She called a day or two after with a lady from Augusta, Maine, that was there that evening. She said Mr. Thomas had packed up his things and brought them over to the city; put his things in her valise, a very costly one, she said; and she wanted to know if I knew where it was, or if I could get it for her. She said she didn't care what became of him, or if she never saw him again, but that she wanted this article. Mr. Brandt told her he knew where it was, and he would go and see if he could get it; that it was at Dr. Moore's. I don't know of any other conversation. She left. That was the last time I ever saw her.

(Answer objected to as irrelevant.)

Int. 52. Between the time said Thomas testified in that case and the present time, have you had any other conversation with her than those related?

Ans. I never have.

Int. 53. Did you ever say to her that you believed her husband would kill you; that he had gone in on the other side, and was telling what he knew about it, or anything to that effect?

Ans. Nothing of the kind.

Int. 54. Did you ever say to her that her husband was going on the other side, and was going to knock all the thing on the head, or anything to that effect?

Ans. I did not. Nothing to that effect. I never saw her after that, except in the presence of other persons, at my rooms.

Int. 55. Did you ever say to her in that connection that you would like to get him, her husband, out of town, or ask her if he would go away if you would provide him with books, or suggest to her his going out of town in any other way than you have already stated?

772 Ans. No.

Int. 56. Did said Thomas at any time make any threats against you? If so, what was the occasion thereof, and what occurred?

Ans. He did. He called at my room one afternoon and introduced a man to me by the name of Jones, of Camden, Maine. Mr. Jones proved to be afterwards Mr. Myrick, of Camden. He, Thomas, wanted to borrow some money and put up his watch; asked me if I'd let him have five. I told him no. They went out, and after a while Thomas came in again—in about half an hour. As he went out he used some very abusive language. He came in again and wanted to know if I'd let him have some money and take his watch. I told him no; never to come into my room again, I didn't want to see him. He then used language too abusive and indecent to relate. I told him to leave; he didn't move quite as quick as I wanted him to, and I moved him with my boot; kicked him about ten times, as nearly as I can recollect, and between each interval he would state that he'd have revenge on me, and used the most awful oaths that I ever heard a man; and I kicked him clear out doors, down three flights of stairs. He after that came into my room again; I was lying on the bed. Quite a number of gentlemen in my room. Said he didn't blame me at all for what I'd done; he'd get down on his knees and ask my forgiveness; began to whimper and cry, and said he'd been drinking. Asked me if he wasn't a clever fellow when he hadn't been drinking, and I told him no, at no time, drunk or sober. He started to come toward me, and I told him to leave the room, or I'd serve him worse than I did before. He didn't wait for me to get to him that time; a second edition he didn't care about.

(Objected to as immaterial and irrelevant.)

Int. 57. At the time of either of said two last-mentioned interviews had you heard that said Thomas had offered or proposed to offer his services to the complainant's counsel?

773 Ans. I had not. He did say to me in the last interview, standing in the door, that his testimony was worth $500 to the side he'd testified on, and he meant to have some money out of it. Said, after he got out of the door, that they were a damn mean set, and didn't pay his mother for coming up here.

Int. 58. When had you last seen said Thomas, prior to the first time you met him last winter?

Ans. It was in the winter of 1857, in Camden—yes, and knocked him down.

Int. 59. State whether said Thomas made any repre tations to you about himself when you first met him last winter, and what they were.

(Objected to as immaterial and irrelevant.)

Ans. He did; he represented himself as belonging to the Young Men's Christian Association; that he was strictly temperate, and was in one of the most popular wholesale drug-stores in the city—Weeks & Potter's—that they got him the situation—the Young Men's Christian Association. I didn't know him at first; he introduced himself as Dr. Thomas. He said this firm was going to raise his wages the next week to $25 per week. Asked me where I was stopping, and called on me afterward; wanted to let him have $100, and take a bill of sale of his furniture; said he had $400 worth in his house, all new.

Int. 60. After you came back from Camden, as stated by you, on the

20th of February, did you say to said Thomas, "By a little hocus-pocus game I got that pencil into the bureau, and made her search for it the next day, and she found it there," or anything to that effect, or of that purport?

Ans. Nothing of the kind.

Int. 61. State whether you inquired of said Thomas the date of his teaching with you in the State of Maine; and, if so, state what occurred; and if you made such inquiry, whether it was before or after you testified in the case.

774 Ans. I did; and it was before I testified in the case. He said it was in 1856, he knew by the age of his boy; and I told him he must be particular about that, to have the year right; that I couldn't recollect then. I was anxious, and he knew it, to ascertain the time. He came over one morning subsequently, all elated; said he'd found a recommendation that I gave him in the Bible. There were three or four persons in the room at the time, and that it was 1856. I asked him to bring it over, that I might see it. He said he would do it, but there was no mistake about it at all. The next day he came over again; I asked him if he'd brought it over; he said no, he laid it out and forgot it; I didn't see or hear anything more of him for a week. Then he came over, and had his nose broken, as he said, by a bedstead, and that's why he didn't come. I asked him about it once afterward, but never got it, and never saw it.

Int. 62. Did he inform you of the nature of the recommendation and what the date of it was?

Ans. He did. He said it was a recommendation that he was qualified to teach, and dated in 1856—a recommendation that I wrote him.

Int. 63. After Mrs. Barbour had testified in Camden, were you informed as to a statement that she had made in it—and, if so, by whom?—that on the occasion of your visit at her mother's, in the preceding January, you had slept in what was termed, on a diagram put into the case by complainants, "the spare bed-room," being a bed-room adjoining Mrs. Thomas' sleeping apartment, on the ground-floor; and, if so, did you thereupon have an interview with her, and what was said thereat?

Ans. I was, and by Peter Thacher, esq. I did have an interview with her. I asked her if she would contradict that statement to Mr. Thacher. She at first said she would, and then said she wouldn't; but she would to Mr. Illfelder, or, I think she might have added, to Mr. Wetmore; I won't be certain; think she did.

(Plaintiff's counsel here request the defendant's counsel to admit the following facts: That, after Mrs. Barbour's testimony was closed,

775 and at the Bay View House in Camden, Maine, Mr. Thacher stated to Mr. Wetmore that Mrs. Barbour either wished to correct or would correct her statement as to the place where Mr. Dunton slept; and that Mr. Wetmore replied that he would see her; and that, if she authorized him so to do, he would consent to the correction being made on the record; and that after an interval Mr. Wetmore reported to Mr. Thacher that he had been to the house, that Mrs. Barbour had authorized the correction, and that he would have it corrected. That after the plaintiff's evidence was printed, it appeared that the correction had not been made, and that that was the occasion of the stipulation which appears upon the record of this date. See page supra.

Defendant's counsel request the plaintiff's counsel to admit that the statement by Mr. Wetmore of his willingness that Mrs. Barbour's statement should be changed as above was made in presence of the examiner, Mr. Thompson, Mr. Thacher, and Mr. Blake, and that Mr. Thacher

then requested Mr. Thompson to make the correction upon the record, and that he then promised so to do. Plaintiff's counsel so admitting, defendant's counsel are ready to admit as requested.

Plaintiff's counsel states that he has no recollection of what was said by Mr. Thompson, and, therefore, cannot admit the defendant's request in that particular. In other respects plaintiff's counsel will admit as requested.)

Int. 64. Where did you, in fact, sleep during that visit at Mrs. Thomas'? and state, if you know, who occupied that bed-room during your visit—who slept in that bed-room?

Ans. Slept up-stairs. I don't know who occupied the bed-room. I didn't see anybody sleep there.

Int. 65. When did your residence in Camden begin?

Ans. I bargained for the place when I was down there in February. I moved there in May, as near as I can recollect. I built a stable. I have resided there since, except when I've come up here on business—about diplomas and other things.

776 Int. 66. Please state what, if any, occasion you have had and have, in Camden, to enter Mrs. Thomas' house.

Ans. That is a much nearer way from my place to the village than by the road, and when I walk I generally go that way; sometimes through the house, and sometimes round it. Mrs. Thomas has made bread and doughnuts for my housekeeping when I have had a number of friends stopping at my house.

Int. 67. State whether or not, for a series of years, there has been an intimacy between you and her family, or how otherwise.

Ans. There has, between me and her and part of the family.

Int. State whether you ever made any threats against Mrs. Barbour in case she should testify in this suit, or made any effort whatever to intimidate her, or prevent her from testifying in it.

Ans. I am not aware that I did.

Int. 69. Did she at any time propose to refrain from testifying, if you desired it; and, if so, what occurred?

Ans. She told me that she knew nothing about the pencil any way; she says, "I told Silas so"—her brother. She told me that many times over—many, many times.

(Question repeated.)

In order to answer that question, I've got to make a little statement. She stated that she should not testify on either side. The day or two before she testified her mother came to my place, stated that they were determined to have Sarah testify on the other side, and that Sarah didn't want to, and that if I would give Sarah ten dollars, or loan her ten dollars—her mother is Mrs. Rachel Thomas—that Sarah would go away. I remarked that I'd no objections to loaning her ten dollars, but I thought she'd better not go; if she did, they'd say it was through my influence she had gone. I accordingly went up with Mrs. Thomas to her house and saw Sarah, Mrs. Barbour, I mean, and made the same statement to her that I had to her mother. But I found there was a change taking place in her, and a strong influence somewhere being brought to bear upon the woman; still, as she said she knew nothing about the

777 pencil any way, I thought there was nothing to fear from her testimony.

(Whole answer objected to as immaterial and irrelevant.)

I should rather use the word "felt" than "thought," in the last clause.

Int. 70. Had you any conversation with Mrs. Barbour regarding what

you had heard Mr. Joseph Illfelder had testified with reference to your threatening or intimidating her, or trying to prevent her from testifying? If so, what was it?

(Objected to as hearsay, irrelevant, and immaterial.)

Ans. I told Mrs. Barbour what I had heard about it, and she smiled, and said something like this: "that she guessed not," as if she meant I had been wrongly informed; she didn't say it in so many words, but I drew that conclusion. I said to her: "I never attempted to intimidate you in any way, did I?" Her mother spoke up and said I frightened them considerably at the time Mr. Illfelder called the first time that morning. He and Mr. Thomas and I was in the room, but there was not one word said by either of them in regard to any influence that I tried to bring to bear to hinder her from *from* telling the truth.

Int. 71. When you say that Mr'. Barbour smiled and said "I guess not," what had you said to her about Mr. Illfelder's testimony?

(Objected to as above.)

Ans. I think I told her—I couldn't say the exact words—that Mr. Illfelder stated that I frightened her so that she didn't dare to tell the truth; something similar to that; not the same words, but about the same meaning. I had only heard about his testimony from Mr. Thacher; hadn't read anything.

Int. 72. Will you please state what occurred at Mrs. Thomas' house on the occasion when you met there Mr. Joseph Illfelder and Silas C. Thomas, at the time when Mrs. Thomas said you frightened her?

778 Ans. I called there in the morning and had a conversation with them, and was about going away from the house. I put on my overcoat. Mrs. Barbour looked out of the window and says: "There comes Silas now, and a gentleman with him." And I learned about that time that a despatch had been sent to them that I was coming down, either from Silas or Mr. Illfelder. I didn't learn which; I had previously told Mr. Thomas that I was coming. When they came into the house some little excitement took place at once. Mr. Illfelder said that there was no pencil with rubber in it made prior to 1857, and he was going to prove it, and the judge would so decide. I thought he said it for bunkum; that started me, and I concluded to stop a little while and not go. I got up and pulled of' my overcoat and laid it down. I thought if that was the game, two could play at it. I told Mr. Illfelder that was a lie at once. I found that they were talking, then, that one year wouldn't make any difference, whether it was 1855 and 1856, or 1856 and 1857; that they'd got that idea into Mrs. Thomas' head; at any rate she so talked and so did Sarah. I said I wanted the thing right; that's all I wanted about it, and that I thought it would make quite a material difference; I think I said that to Mrs Thomas at that time. There was some loud talk, some excitement. The first speech that Mr. Illfelder made started me. They told me that Silas had been there the night before, at that time.

Int. 73. Is the Chapman who assisted you in teaching at Newburyport still living?

Ans. He is not.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Where did you and your wife first go after your marriage, on the 8th of October, 1855?

Ans. To the Adams House, in Boston.

Cr.-int. 2. How long did you remain there?

Ans. I think about four days, as near as my recollection serves me.

Cr.-int. 3. Where did you next go?

Ans. Went to her mother's, in South Boston.

779 Cr.-int. 4. How long did you remain there?

Ans. Well, I think a few days; not but a very few.

(SEPTEMBER 19, 1873. Adjourned till to-morrow at 9.30 a. m.)

SEPTEMBER 20, 1873.

Deposition continued pursuant to adjournment.

Cr.-int. 5. How long, to the best of your recollection, did you remain at Mrs. Pendleton's?

Ans. About four days; four or five days; somewhere along there.

Cr.-int. 6. Do you remember whether you spent a Sunday there?

Ans. I don't recollect whether I did or not.

Cr.-int. 7. Where did you next go?

Ans. That I am not able to tell. I know I was fighting a strong opposition and going from city to town. I had been fighting it all summer. Mr. Scribner was putting out his books as my revised series, and the committees supposed he was putting my books in—that he was still with me. He so represented it at Chelsea and Providence. I went to those places and got the vote rescinded and my books back again.

Cr.-int. 8. Did Mrs. Dunton accompany you?

Ans. She did, to many of the places. I don't think she did at Providence. I was there over a week.

Cr.-int. 9. Were you at Providence before or after you taught at Newburyport?

Ans. I think it was before.

Cr.-int. 10. Did Mrs. Dunton accompany you to the other places, with the exception of Providence?

Ans. I think not.

Cr.-int. 11. Where was she when you were visiting the places which you went to after your marriage, as mentioned in your answer to the 7th cross-interrogatory?

780 Ans. I presume I didn't answer that question. I went back to make a fair statement of what I was doing that fall and summer. That was after I was married. This was before I was married.

Cr.-int. 12. Confining yourself exclusively to the time after your marriage, where did Mrs. Dunton and yourself go immediately after the visit you have mentioned which you made to her mother's in South Boston?

Ans. That I'm not able to answer.

Cr.-int. 13. Have you any recollection on the subject?

Ans. I know that we went to Newburyport; and I know I went to Salem, and I also know that I went to the State of Maine.

Cr.-int. 14. Did Mrs. Dunton accompany you to Salem?

Ans. She did.

Cr.-int. 15. Did you teach there?

Ans. I did not. I went into schools. I was then getting recommendations from places where I had taught, as I had a strong opposition against me, and putting them on their guard against Mr. Scribner's course. That's what led me to Maine.

Cr.-int. 16. Do you remember where you stopped at Salem?

Ans. I do not.

Cr.-int. 17. Did you go to Lynn at or about this time?

Ans. I was at Lynn during the summer or fall; but I don't recollect the time. Pretty hard to recollect, driving as I was that fall.

Cr.-int. 18. Was Mrs. Dunton with you at Lynn?

Ans. I couldn't say, of a certainty, whether she was or not.

Cr.-int. 19. Do you remember any other city or town in Massachusetts which you visited in company with Mrs. Dunton that fall, after your marriage?

Ans. I don't recollect any at this time.

Cr.-int. 20. Were you at Newburyport with Mrs. Dunton before or after you went to Maine?

Ans. I have the impression that I was there both before and after. I got a letter from my publishers, who were putting me on my guard
781 against Scribner's designs, that he had gone down to Maine, and I knew that as he was known there, he could remove my books, as he did in other places, by deception, and I accordingly went to Maine in great haste; but I found when I got there that he'd not been there—had gone somewhere else. This was done to lead me astray, I suppose; that was his way of doing business.

Cr.-int. 21. Did you give private lessons at Newburyport before you taught in the public schools?

Ans. I don't know whether I did or not. I have the impression that I was making preparations there for going into the schools, and I think I gave some private lessons.

Cr.-int. 22. Did you advertise in the papers?

Ans. Quite likely; I don't know. I most generally did.

Cr.-int. 23. Were you paid by the city for teaching in the public schools?

Ans. I was.

Cr.-int. 24. Do you remember the rate and amount?

Ans. I do not.

Cr.-int. 25. Where did you stay when you and Mrs. Dunton were at Newburyport?

Ans. I don't recollect the name of the house. I think I was at two places while there; I am not able to say for a certainty.

Cr.-int. 26. How long were you absent in Maine?

Ans. I think about—not far from a week.

Cr.-int. 27. Did you leave Newburyport for Maine and return to Newburyport?

Ans. As near as my recollection serves me, I came from Portland to Newburyport. Whether I went that way or not I am not able to say, or whether I went from Boston.

Cr.-int. 28. Were you at Mrs. Thomas'; and, if so, when did you arrive and when did you leave?

Ans. I was. I am not able to say.

Cr.-int. 29. Did Mrs. Dunton accompany you when you visited Mrs. Thomas?

Ans. She did.

782 Cr.-int. 30. By what conveyance did you go to Maine, and by what conveyance did you return?

Ans. To the best of my recollection, I returned in the boat and cars; but I don't recollect how I went, whether in boat and cars or in the boat.

Cr.-int. 31. Did Mrs. Dunton return with you to Newburyport?

Ans. I think she did; I have that impression.

Cr.-int. 32. Were the books which you say you saw Mr. Scribner copying, and which were the source of the opposition which you have mentioned, the books concerning which a copyright suit is now pending?

Ans. They were not.

Cr.-int. 33. Is there not a suit pending in which Woolworth, Ainsworth & Co. are plaintiffs, in which it is alleged that the series of writing-books, or some part thereof, issued by your publishers is an infringement on the copyright held by Woolworth, Ainsworth & Co. for the series of Payson, Dunton and Scribner?

Ans. I have so understood.

Cr.-int. 34. Have you or your publishers ever instituted a suit for any alleged infringement of the copyright of your books or any of them?

Ans. Not that I know of.

Cr.-int. 35. When you went to Camden last February what time did you leave Portland, and what time did the train reach Rockland on the day of your arrival?

Ans. I left Portland quite early Saturday morning, and arrived at the usual hour. I couldn't say; some time in the middle of the day—near the middle.

Cr.-int. 36. How did you go from the station to the town of Rockland, where the hotel is?

Ans. I rode, to the best of my recollection.

Cr.-int. 37. Where did you take dinner?

Ans. At Dr. William Pendleton's, I think, in Rockland.

Cr.-int. 38. By what conveyance did you go from Rockland to Camden?

Ans. I am not able to say whether I went with him or in the
783 stage; I can't tell. I had an invitation to ride up. I don't remember whether I went with him or in the stage.

Cr.-int. 39. How long did you remain at Dr. Pendleton's after dinner?

Ans. Not long; a short time.

Cr.-int. 40. How far is it from Rockland to Camden?

Ans. About eight miles; about seven from his place. He lives at the extreme north of the village.

Cr.-int. 41. Does he live a mile from the large hotel at Rockland?

Ans. I should say about a mile; it may be a little less, not much.

Cr.-int. 42. Did you stop anywhere between Rockland and Camden?

Ans. I did not.

Cr.-int. 43. Did you first stop at the Bay View House in Camden, on your arrival?

Ans. I don't recollect.

Cr.-int. 44. Where is the first place you went to?

Ans. My brother's, Mr. Washington Dunton's, is the first place I recollect. His place of business.

Cr.-int. 45. How long were you there?

Ans. A few minutes; long enough to make inquiries about the pencil.

Cr.-int. 46. Where did you go from there?

Ans. To Mrs. Thomas'. I don't know but I went into the barber's shop first, and I don't know that I did.

Cr.-int. 47. What did you do in the barber's shop while you were there?

Ans. Oh, brushed my hair and brushed my clothes—fixed up a little. Couldn't say whether I was there before or after I went up. I know I was there in the afternoon. I also called to see a horse I had let Mr. Harwood have, but I can't say whether it was before or after I went up.

Cr.-int. 48. Do you remember whether you went to any other place before you went to Mrs. Thomas', except those you have mentioned?

Ans. I don't remember whether I did or not; I don't remember whether I went to these places before I went up. I have the im-

784 pression that I went to Mr. Harwood's to see the horse after I went up there; to the best of my recollection, I did.

Cr.-int. 43. How far is it from your brother's place of business to Mrs. Thomas'?

Ans. I should say one-third of a mile, as nearly as I can judge distance.

Cr.-int. 44. Who did you first see when you reached Mrs. Thomas'?

Ans. That I couldn't say.

Cr.-int. 45. Name all the persons you saw while there on your first call.

Ans. I saw Mrs. Thomas, Mrs. Barbour, and a son of Mrs. Thomas, but I couldn't say whether he was there when I went in or not; I saw him that day.

Cr.-int. 46. What was the name of the son?

Ans. I don't know his first name; there are a number of boys, but I don't know their names.

Cr.-int. 47. Who was present when you first spoke to Mrs. Thomas about looking for the pencil?

Ans. I don't recollect that any one was, when I first spoke to her about it. I think I spoke to her in the kitchen, where the big stove was; she was out there at work.

Cr.-int. 48. What did you say?

Ans. Told her I came to see if I could get a pencil that had rubber on one end. She said she would go, said she was tired, had a pretty lame back; she was pretty sick, she told me that day.

Cr.-int. 49. Was that all that was said between you on that subject at that time?

Ans. She said she would go. I told her I guessed she needn't then, that I was going down town, and I did go.

Cr.-int. 50. Is that the whole of the conversation in relation to that subject which took place between you at that time?

Ans. That is as near as I can recollect.

Cr.-int. 51. Is that all, as near as you can recollect?

Ans. That is all, as near as I can recollect.

Cr.-int. 52. When did that conversation occur?

Ans. Saturday afternoon.

785 Cr.-int. 53. Where did you go after you left Mrs. Thomas' that afternoon?

Ans. I went down to the village.

Cr.-int. 54. Where did you go to?

Ans. I don't remember whether I went to see the horse before or after.

Cr.-int. 55. Where did you go to see the horse?

Ans. To Mr. Harwood's, Lyman Harwood's.

Cr.-int. 56. Where was the horse kept?

Ans. In the stable near the house, that adjoins the house.

Cr.-int. 57. Did you go anywhere else?

Ans. I might; don't know. I met a number of friends round.

Cr.-int. 58. Who did you first see when you returned to Mrs. Thomas'.

Ans. Mrs. Thomas, I think.

Cr.-int. 59. Was any one else present?

Ans. I think Mrs. Barbour was present, or very soon after.

Cr.-int. 60. What was the first thing you said in reference to the pencil?

Ans. I think Mrs. Thomas told me that she'd found a pencil—two, she told me, one the kind that I wanted, and the other one; I took them both.

The other was a style that had never been sharpened, a composition instead of lead. It was made by Faber. I think I sold Mr. Faber the receipt for making those pencils, or one of his men.

Cr.-int. 61. Did you or Mrs. Thomas speak first in regard to the pencils at this conversation?

Ans. I couldn't say which spoke first, not for a certainty, whether I asked her if she found it, or she told me; not for a certainty. I have the impression, however, that I asked her.

Cr.-int. 62. Where were those pencils on that occasion when you first saw them?

Ans. I couldn't say whether she handed them to me or they were laying on a stand or some books; I couldn't tell which; I know
786 that I spoke at the time—made the remark that I never inquired for anything in the house that I wanted but what she had it. Mrs. Barbour was at the sink, washing or doing something, when I made the remark.

Cr.-int. 63. Were there any lamps in the house at the time, or was it daylight?

Ans. It was daylight.

Cr.-int. 64. Was that the whole conversation in reference to the pencils that occurred at that time?

Ans. There might have been something more said, but according to the best of my recollection that's what it amounted to; might have spoken about its saving me some trouble; don't know whether I did so at that time. I had some conversation of that kind. I know I spoke about going down town again that evening. I felt elated and wanted to inform my brother and some others what I'd got. They persuaded me not to go. I was pretty sick; had a very sick headache in consequence of sleeping cold in Portland; nearly froze to death.

Cr.-int. 65. Did you have any other conversation with Mrs. Thomas or any inmate of the house during your stay there, in reference to the finding of the pencil?

Ans. I might, or might not; I don't recollect.

Cr.-int. 66. Are you willing to swear you did not have?

Ans. I'm not willing to swear that I did not, or that I did. I was not there much anyway while I was there during the day-times. I was away all next day, Sunday, from breakfast-time till quite late in the evening, after dark.

Cr.-int. 67. Did you mention the subject of your finding the pencil in the presence of any of the inmates of Mrs. Thomas' house, at this time, except as you have stated?

Ans. Not that I recollect. I don't remember whether I did or not. I might.

Cr.-int. 68. Did you ever mention the subject of your finding the pencil to Mrs. Thomas again at any time?

Ans. I have.

Cr.-int. 69. How frequently?

787 Ans. Since Mrs. Barbour's testimony there has been a good deal of backing and filling with certain parties.

Cr.-int. 70. Have you or not mentioned the subject to Mrs. Thomas, in regard to the day the pencil was found, since Mrs. Barbour's testimony?

Ans. I have.

Cr.-int. 71. Did you mention the subject of your finding the pencil to any person, except as you have mentioned, outside of Mrs. Thomas'

house prior to Sunday morning, the next day after the Saturday that you arrived in Camden?

Ans. Not to the best of my recollection; didn't have any opportunity, as I was in the house and retired early.

Cr.-int. 72. Where was the stand with the books on it on which you say the pencils may have been lying when Mrs. Thomas told you she had found them, situated in the room to the right or the room to the left of the main entrance door to Mrs. Thomas' house?

Ans. It was to the right. I was not in the room to the left during my stay there.

Cr.-int. 73. Did you take dinner or supper at Mrs. Thomas' Sunday?

Ans. I ate a little something; some cold chicken in the evening when I came back. She said she had saved some for me; expected me there to dinner.

Cr.-int. 74. Where did you dine Monday?

Ans. I couldn't say whether I dined there or with my nephew, Aubrey Dunton. I dined with him while there; couldn't say whether that day or the next; took as many as two meals with him while there.

Cr.-int. 75. Were there any other inmates of Mrs. Thomas' house while you were there, except Mrs. Thomas and Mrs. Barbour and the young man? Do those comprise all the persons staying in the house at that time, except yourself?

Ans. I don't know; but I believe those were all. There may have been other callers there; these are all I recollect. Seems to me as if I remember seeing somebody else there Sunday evening; but I wouldn't swear to it.

788 Cr.-int. 76. Do you remember Mrs. Barbour and the young man going to Mrs. Philbrick's any of the time you were there?

Ans. I don't know that for a certainty.

Cr.-int. 77. Do you remember their going out for that purpose?

Ans. I do not.

Cr.-int. 78. Where did Windle use to keep, at whose place you say you used to trade a good while ago?

(Objected to as assuming what the witness has not stated.)

I refer to the following statement in your answer to the 29th direct int., "I bought a gross of pens—inquired for Windle's pens; a place I used to trade a good while ago."

Ans. I never intended to make any statement of that kind. That is very much mixed. I used to trade at Mr. Gay's a good while ago, and I used to get Windle's pens—a foreign pen.

Cr.-int. 79. Did you know Capt. Barbour, the husband of Mrs. Barbour? and so you remember when and how he died?

Ans. I was not acquainted with him. I do not remember. I learned from Mrs. Barbour that he was drowned.

Cr.-int. 80. Lost at sea?

Ans. I think so. That was when I was down last—the time before the last, during summer. Some one said she didn't live with her husband; that there was a separation; and I asked her about her husband before her mother, and she was very much offended. I apologised, and told her I meant no harm; that I only asked to contradict the report I had heard, which I did at once. She seemed to lay that up against me; I don't know from what cause. She wished me to tell her where I got my information, and I declined until I had first seen them. I then told her that I'd contradict it, and that I thought it was a small matter to show so much feeling as she did; that I meant no harm.

789 Cr.-int. 81. Did not Mrs. Thomas, in response to your inquiry,

show you an old newspaper containing a mention of Capt. Barbour's death, and refer to the fact that he had been lost at sea many years before?

Ans. She went to look. I told her that it was unnecessary, that I had no doubt of it, and I would contradict the statement I had heard made. She got it and read it to me, however—something about it. There seemed to be a great excitement about nothing there at that time.

Cr.-int. 82. Did you make any pencils at all with rubber in the end last winter?

Ans. I dictated how to make them. They were made under my direction.

Cr.-int. 83. Did you make any yourself personally?

Ans. Not to my recollection.

Cr.-int. 84. Did you make any yourself this spring?

Ans. I have made some two or three.

Cr.-int. 85. When and where were those made?

Ans. I couldn't say. I made them from Faber's pencils.

Cr.-int. 86. Did you make them in Boston?

Ans. I couldn't say whether I made them in Boston or made them down East. I know I've made some; how many I couldn't say. I know I've made some. I know I had one down East with me—a Faber with rubber in the end—and Mr. Illfelder seemed very anxious to get it. He offered me one of his for it. I didn't conclude to trade with him. That was at the hotel in Camden. He said then, "You seem to carry those pencils with you." "Well," says I, "yes, sometimes."

Cr.-int. 87. Was it before or after Mrs. Lura C. Thomas called at your office, as you have stated in your direct examination, that she wrote you the letter complaining of your statements in reference to her husband, which was produced upon her cross-examination?

Ans. The letter was written after she called there.

Cr.-int. 88. About how long after?

Ans. Well, I couldn't say.

Cr.-int. 89. How long, to the best of your recollection?

790 Ans. I couldn't tell. It was sent to me while I was at Camden, and I received it there. I saw at once that it was a put-up thing to smooth over what she had told me about her husband's robbing a man at a hotel of $300.

Cr.-int. 90. Have you the letter?

Ans. The letter is in the case.

(Counsel for defendant requests counsel for complainant to admit that when said letter was shown to said Lura C. Thomas and marked for identification, when she was testifying, at folios 391 to 399 of complainant's record, said letter was shown to and read by complainant's counsel. Admitted as requested.)

Cr.-int. 91. The said letter has not yet been offered in evidence in the case. Can you produce the same; and, if so, will you do so?

Ans. I cannot produce it. I supposed I gave it to Mr. Washburn; gave it to him according to the best of my recollection.

Cr.-int. 92. Will you produce it?

Ans. I will, if it's in my power. I should be but too happy in doing it.

Cr.-int. 93. Were you at Mrs. Thomas' house in Camden the day Mrs. Barbour was called as a witness in this case, before she testified, and on the morning of that day?

Ans. I was, that morning or the morning previous. I am not able to say whether it was that or the previous morning.

Cr.-int. 94. Did Mrs. Barbour tell you that she had been subpœnaed to testify at the Bay View House?

Ans. She or her mother, I think, did; I couldn't say which.

Cr.-int. 95. Did you say anything about being there yourself?

Ans. Emphatically, no.

Cr.-int. 96. What was the date of your next visit to Camden, after you were there in February?

Ans. I'm not able to say.

Cr.-int. 97. Did Silas Thomas show you the pencil which he
791 first said he made in 1857, and testified to that he made in 1861, before or after you went to Camden, in February?

Ans. To the best of my recollection, after.

Cr.-int. 98. How long after?

Ans. The first time I saw him after I came back; he gave it to me the same day I returned.

Cr.-int. 99. Where did you see him?

Ans. I met him, I think, at the door.

Cr.-int. 100. What door?

Ans. The door where you have access to the building.

Cr.-int. 101. What building?

Ans. Where I have my rooms, 16 Tremont street.

Cr.-int. 102. Did he give it to you?

Ans. He did.

Cr.-int. 103. What did he say about it at that time?

Ans. Said he made it in 1857.

Cr.-int. 104. Was that the first time he mentioned it?

Ans. Said he was very sure he had one that he made just after he lost the one I let him have in 1856.

Cr.-int. 105. When had he said that?

Ans. He'd said it previously, and wanted to go to Augusta to get it.

Cr.-int. 106. Did he state when, where, and how he got it when he gave it to you?

Ans. He did; he said it was sent by express, and showed me the bill and piece of paper, which was $1.65 or $1.85; but my nephew said he saw him add the $1.00 in the room, the express being only 65 or 85c.; he said he'd have some drinks on that.

Cr.-int. 107. Who paid the express?

Ans. I understood Mr. Thacher paid the express; he told me so at any rate.

Cr.-int. 108. Did he show you the bill when he gave you the pencil?

Ans. Yes. I think he did. He did.

Cr.-int. 108. Did Wiley say when he saw Thomas raise the express bill?

Ans. He did; told me where he done it.

Cr.-int. 110. When and where did he say he did it?

792 Ans. At my table, in my room, 14 Tremont street, a few days after he brought it here. I mentioned it to Mr. Thacher as being a dishonest trick, and I hadn't any confidence in the man. I also told him that I didn't believe that he sent for the box; subsequently I told him that. He said he did and he could prove it, and furthermore he could prove that the pencil was made in 1857.

Cr.-int. 111. What time of day did you see Thomas when he gave you the pencil?

Ans. It was the forenoon.

Cr.-int. 112. How long did you see him at that time?

Ans. Not long. I got the pencil. He gave it to me with a good deal of reluctance; didn't want me to have it; said it was a good piece of testimony and he ought to have $500 for it.

Cr.-int. 113. What did you do with it—the pencil?

Ans. I brought that and the one I got at Camden, Maine, directly to Mr. Thacher. It was not at that interview, at that time, that I doubted the genuineness of the transaction.

Cr.-int. 114. When you brought that pencil and the one you got at Camden to Mr. Thacher, was that the first time that you had brought either of the pencils to Mr. Thacher?

Ans. It was.

Cr.-int. 112. And you brought them both at the same time?

Ans. I did.

Cr.-int. 116. Did you see Thomas again on the same day when he gave you the pencil?

Ans. Not to my recollection. I heard from him.

Cr.-int. 117. In what way?

Ans. I heard that he was intoxicated.

(SEPTEMBER 20, 1873, 2 p. m.—Adjournment, by consent, until 3 p. m. same day.)

793 SEPTEMBER 20, 1873.

Deposition continued pursuant to adjournment.

Cr.-int. 118. When Thomas first showed you the express bill, was it not 80 cents; and did he not state that he had only received 60 cents to pay it with?

Ans. He did not.

Cr.-int. 119. And did he not afterwards say to you that you were the one who had suggested putting the "1" before the "80," and making the bill $1.80?

Ans. He did not. The bill was paid when I first saw it. He brought the pencil to Mr. Thacher, and Mr. Thacher paid the bill. Thomas wouldn't leave the pencil, though the bill was paid. It was paid while I was down East, in Camden, before I got back.

Cr.-int. 120. Is that the bill?

(A paper shown witness by Mr. Wetmore.)

Ans. I hardly noticed it. I shouldn't be willing to say. I couldn't swear to that no way.

(Said paper marked for identification by the magistrate.)

Cr.-int. 121. On the occasion when you say you showed Mr. Illfelder one or more of the pencils manufactured by yourself, with rubber and lead in them, at Camden, was that the time when you saw Thomas and Illfelder there, about the last of April or first of May last, being the first time you went down to Camden after you had testified on your cross-examination in this cause?

Ans. I wouldn't say whether it was the first or second time that I showed it to him now. Perhaps if I should wait a little time I could recall it.

Cr.-int. 122. Where did Mrs. Thomas stay when she came to this city on the occasion of her testifying?

Ans. She came very late in the night, when the cars got in. Was very tired and exhausted, and said she couldn't go any further. I told her I thought I could accommodate her in one of my rooms, and she staid there all night that night.

794 Cr.-int. 123. What time was it when you saw Thomas with his nose broken?

Ans. Well, I couldn't tell what time it was; not able to say. He told me that the nose was broken; that's what he said to me.

Cr.-int. 124. Was that before or after he testified the first time?

Ans. I'm not able to say; but I rather have the impression that it was after. I wouldn't swear to that.

Cr.-int. 125. Did you kick him down stairs, as you stated, before or after he testified?

Ans. After.

Cr.-int. 126. Did he have the broken nose at the time you kicked him down stairs?

Ans. His face had got well at that time; better, at any rate. I won't say entirely well. The first time I saw him after he came over his face was all painted over white on one side to cover the black.

Cr.-int. 127. Did you tell him anything about finding the pencil that had been carried over to the photographer's from your rooms on the night of the great fire?

Ans. I may and may not. I don't recollect.

Cr.-int. 128. How long after the fire did you find those pencils?

Ans. Well, it was many weeks and months, I think; it may have been. I don't know how many months after.

(Plaintiff's counsel request the production of the letter above referred to, previously marked for identification.)

Additional direct:

Int. 1. Have you seen Silas C. Thomas write, and are you acquainted with his handwriting?

Ans. I have, and am acquainted with his handwriting, and think I am able to tell it under all circumstances by comparison with other specimens of his handwriting—any piece.

Int. 2. Will you look at the paper above marked for identification by complainants, purporting to be an express notice, and state in
795 whose handwriting, in your judgment, the words and figures therein, below the magistrate's writing, are?

Ans. My opinion is, from what I know of his handwriting, that that is in Silas C. Thomas' handwriting, but I'm not willing to swear positively without comparison with certain papers in his handwriting.

(Counsel for defendant requests that said express notice be appended to the deposition of this witness. The said notice having been marked for identification, plaintiff's counsel decline to put it in evidence or have it attached to the deposition at the present time.)

Int. 13. Please state what date appears on that express notice.

Ans. February 25, 1873.

Int. 4. To the best of you recollection, what o'clock was it when Mrs. Thomas arrived at your room, No. 14 Tremont street, on the night inquired of by complainant; and state whether or not you had then gone to bed.

Ans. I had expected her that night and went to the cars to meet her. She didn't come, and I went home and went to bed. It was very late; nearly midnight, at any rate.

A. R. DUNTON.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 20, 1873.

796 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of L. H. BRADFORD, taken on behalf of the defendant, Boston, Mass., Sept. 20, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. L. H. Bradford; engraver; 53–4 Warrenton st., Boston.

Int. 2. You are the Mr. Bradford, are you not, formerly a member of the firm of Tappan and Bradford?

Ans. Yes, sir; I was formerly a member of that firm.

Int. 3. Will you please look at this chart, (defendant's Exhibit O,) and state whether you engraved said chart. (Said exhibit shown witness.)

Ans. I executed it myself. I believe I lithographed every line of it, except this hand; that I did not do.

Int. 4. Please state whether or not you have from time to time engraved copy-books or other charts for Mr. A. R. Dunton.

Ans. I have not, sir; this is the only thing I have ever done for him.

Int. 5. Will you please state what was the condition in which Mr. Dunton furnished you the original copies to be lithographed, in relation to being perfect or otherwise?

Ans. Well, gentlemen, it's a long story. He would bring in a
797 letter on other pieces. (Question repeated.) I wouldn't work from a copy unless it was perfect. He was a very particular man, and I couldn't work from anything that could be found fault with afterwards.

L. H. BRADFORD.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 20, 1873.

SEPT. 20, 1873. P. THACHER, esq., recalled.

Int. 1. Please state whether you paid Silas C. Thomas, who gave a deposition on behalf of defendants in this suit, any sum, and, if so, what and when, as the amount of the express charge, or so represented to be, of getting his pencil-eraser, by him produced in this case, from Maine.

Ans. Thomas had told me that he was sure there was pencil-eraser in a small box packed up with his goods at Augusta, Maine, and proposed to me to pay his expenses that he might go down there and get it. He proposed various sums, one after the other, each less than the former, until finally he proposed that I should give him five dollars on account of his expenses down there, and he should go and get it. I replied to each proposition that it would be a foolish expenditure of money to send him down there when his goods were coming up here anyway, and declined, but told him that I would pay whatever it cost to send up the large box, which he said contained his writing-materials, although all we wanted was this pencil-eraser. He came into the

office one day, not later than the 18th day of February—on the 18th, I have no doubt—and told me that he'd got the box, and showed me some figures on a little piece of paper he had in his hand, at the same time saying that he shouldn't ask me to pay anything more than he had paid out. My recollection is that the figures were one eighty something.

798 I can't recollect the last figure; seems to me it was 1.85, but he saying that he had paid only 1.60, I gave him that amount, he saying that was all right. I think he made some explanation of how the figures came to be 1.85, if he only paid 1.60, but I didn't attach any importance to it, and I don't remember it. I think he took the paper away with him. I haven't seen it since. I made an entry in my cash-book of that amount paid him February 18th, and know it was not later than that date.

Int. 2. Did you see and examine the paper purporting to be an express notice, shown to the last witness, A. R. Dunton? And, if so, state what sum appears thereon as the express charge.

Ans. I did see it; the sum so appearing thereon as the express charge is $1.80.

PETER THACHER.

Subscribed and sworn to before me.

F. DODGE, *Examiner.*

BOSTON, *Sept.* 20, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER *vs.* EBERHARD FABER. } In equity.

The deposition of JOSEPH P. WATERHOUSE, taken on behalf of the defendant, at Boston, Mass., September 22, 1873, before F. Dodge, special examiner.

799 Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Joseph P. Waterhouse; age 49; 54 Gray street, Boston; bookkeeper.

Int. 2. You are the same gentleman, are you not, who testified in this case on behalf of the complainant in June last?

Ans. I think so. Yes, sir.

Int. 3. Calling your attention to the fifth interrogatory then put to you, and your answer thereto, which are as follows: (Int. and answer read.) "Did you ever have any business connection with him, (A. R. Dunton,) and, if so, what was that connection, and when did it occur?" Ans. "I have; I taught penmanship for him, in 1853, for about, I think, between two and three months, I think it was," I now inquire if your present recollection is the same as then stated by you?

Ans. It is the same, with the exception that, perhaps, I should say I had been with him longer than the time intimated in the answer.

Int. 4. Are you acquainted with William M. Scribner?

Ans. I am.

Int. 5. During the time that you were engaged, as stated, with Mr. Dutton in teaching penmanship, did you at any time see said Scribner, either at said Dunton's rooms or in the city of Boston?

Ans. No recollection of it.
Int. 6. Do you know where he then was?
Ans. I do not.
Int. 7. Do you recollect of seeing any letters during that time addressed or sent by him from the western country?
Ans. I don't think I did.
Int. 8. Where did you understand he then was?
Ans. To the best of my recollection, Mr. Dunton told me he was in St. Louis.
800 Int. 9. Have you been employed to any extent in looking up testimony for the complainant in this case?
Ans. I should say not very largely.
(Question repeated.)
Ans. I have, to a small degree, perhaps.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. You understood, do you not, that a business connection existed between Mr. Scribner and A. R. Dunton?
Ans. I did.
Cr.-int. 2. Did you know, and, if so, do you now remember, who succeeded you as assistant when you left Mr. A. R. Dunton?
Ans. I do not now remember.

J. P. WATERHOUSE.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 22, 1873.

801 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of HORACE G. TUCKER, taken on behalf of the defendant, at Boston, Mass., Sept. 22, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of the witness thereto:

Int. 1. Please state your name, age, residence, and business.
Ans. Horace G. Tucker; 49 years of age; residence, Boston; place of business, J. L. Fairbanks & Co., stationers, 186 Washington street.
Int. 2. Are you acquainted with Alvin R. Dunton, teacher of penmanship; if so, how long have you known him?
Ans. I have known him, and, to the best of my recollection, as long ago as 1840.
Int. 3. Please state whether said Dunton called at your store last winter; and, if so, as nearly as you can state, what time in the winter, and what then occurred, as particularly as you can.
Ans. As to the month, I can't tell precisely, but, to the best of my recollection, seven or eight months ago Mr. Dunton called into our store, and showed me a piece of a lead-pencil which he wished me to inform him if I had them or could tell him who did have them. He remarked at the time that Mr. Whittemore sent him in, thinking that I would know

who had the pencil. The piece of a pencil was, as near as I can recollect, about half of a lead-pencil; it bore upon one side the letter "K"
802 and "Blunt." I told him it was a pencil we had always kept. I think, to the best of my recollection, there was a piece of rubber inserted at the other end of the pencil, where the lead should have been. There was nothing to call my special attention to it. I don't remember what was on the other side, as I took no particular notice; I know I told him at once whose pencil it was; that it was Rhodes and Sons, of London, imported by Herrick & Blunt, of New York. He wanted to know where he could find them. I told him I thought I had some about the store, but could not put my hand upon them. I then told him that either Thomas Groom & Co., Messrs. Hooper, Lewis & Co., or Aaron R. Gay & Co., they keeping odds and ends of most everything—the last-named firm, I mean—would be likely to have them. He asked me how early I thought they were made. I forget precisely my reply; it was that they had been made a long time, but our old books had been destroyed in change of our firm, and I could not give him the correct date.

Int. 4. Had you, in fact, ever sold the Herrick & Blunt, Rhodes and Son pencil to said Dunton; and, if so, how long ago, according to your best recollection?

Ans. I have sold him a good 'ma'y. As to dates, it would be almost impossible for one to state. We have sold but very few of them to any one in the last ten years.

Int. 5. State whether you recollect of making any remark to him touching having sold him any such pencil upon that occasion; if so, state what it was.

Ans. I don't remember, at present, that I made any special remark.

Int. 6. Will you describe the appearance of that pencil-eraser as nearly as you recollect, as particularly as you can, as to its having used or the contrary?

Ans. As I stated before, it was something less than half a pencil, I should say, and looked as if it had been used some time.

Int. 7. Do you think you could recognize it if you were now to see it? Have you ever seen it since?

803 Ans. I think I might; am not sure. I have never seen it since.

Int. 8. Please examine the defendant's exhibits carefully, and designate that exhibit if you can.

(Defendant's pencil exhibits here shown witness, as in deposition of Whittemore, above.)

Ans. To the best of my recollection, I should say that was the pencil. (Exhibit E selected by witness.)

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Which was the oldest firm, if you know, J. K. Herrick & Co., or Herrick and Blunt?

Ans. Herrick and Blunt was the oldest; that's my impression now.

Cr.-int. 2. Do you remember what you told Mr. Dunton about the firm of J. K. Herrick & Co., if anything, on this occasion?

Ans. My impression is that I told him that Herrick and Blunt had been out of business for a long time, and the firm changed, I think, to J. K. Herrick & Co.

HORACE G. TUCKER.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 22, 1873.

REC. 215—29

804 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of AMBROSE HERRIMAN, taken on behalf of the defendant, at Boston, Mass., Sept. 22, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, age, residence, and business.

Ans. Ambrose Herriman; 52; Medford, Mass.; have a varied business—agent, teacher, author, and publisher.

Int. 2. Do you know Alvin R. Dunton, teacher of penmanship; if so, how long have you known him?

Ans. I do, sir; ever since 1845—1844 or 1845—I can't tell exactly how long.

Int. 3. State what your business has formerly been, and if you had any connection with any institution in the State of Maine; state what and how long.

Ans. I was connected with the Maine State Seminary as teacher of writing and book-keeping for some years, now called Bates' College, Lewiston, Me. I should say from 1845 to 1855; I was there occasionally; my name was on their list, and I came whenever there was an opening for me.

Int. 4. Did you, while engaged in teaching at said Lewiston, visit Boston, and there have an interview with A. R. Dunton? and, if so, state what led to it, and what took place thereat, and when it was.

(Objected to as not in rebuttal, immaterial, and irrelevant.)

805 Ans. In the spring of 1855 I got up a set of copy-books. I wrote them up. Came to Boston to get the copies engraved. I called on Mr. Boynton—G. W. Boynton, engraver. I did not succeed in getting him to engrave them, not at that time. My copies were not arranged so that I could use them and get them engraved and printed as they were. I was not acquainted with that kind of business at the time. I called on Mr. Dunton to assist me about it. He told me he was very busy, and could not possibly render me any service. I asked him to write me a set of copies. He said he couldn't spare the time; that I could write them well enough myself; told me how to do it, and what to do it with. He told me that he was accustomed to write up his copies with pencil or red chalk reduced to ink; that if I didn't get a line just right I could erase it, and said, "Here's what I do it with," and he gave me a pencil. Says he, "This is what I use as an eraser." The pencil, as near as I can recollect, was a wooden pencil; he had taken out a slit of lead and inserted rubber, and I think it was tied in with a thread to make it secure, so it could be used. He also gave me a style for marking cards, and told me what it was made of. I took them home and found them very useful in getting up my copies, which I soon completed and brought to Boston, and Mr. Boynton engraved them.

(Answer further objected to as hearsay, and relating to prior knowldge of a person not given in the answer.)

Int. 5. Do you mean that there was rubber at both ends; or, how was it? Describe it particularly.

(Same objection to question and answer as above.)

Ans. One end, sir.

Int. 6. What was there at the other end?

(Objection continued.)

Ans. Lead, common lead-pencil.

Int. 7. In what way did you find it useful?

(Objections continued.)

806 Ans. I took the course that Mr. Dunton directed me. I wrote the copies with pencil, and when I didn't get a line right I would erase it. I was not accustomed to getting up copies as I have been since, and it was of considerable service to me.

Int. 8. You say Mr. Dunton gave you one eraser. Did you see others at that time at his room, and, if so, how many?

(Objections continued.)

Ans. I saw several pencils in a box on a table or desk, I think, out of which he took the one he gave me.

Int. 9. By "pencils," in your last answer, what do you mean?

(Objected to as leading. Objections continued.)

Ans. Well, sir, nothing more than a box containing sundry pencils of different kinds. I didn't examine them. I am quite certain he took out the style he gave me from that same box, to mark cards with.

Int. 10. State whether or not you observed among them any pencil-erasers constructed like the one you say he gave you, having lead in one end and rubber in the other; and, if so, how many?

(Same objection. Objections continued.)

Ans. Didn't examine, sir. I couldn't say.

Int. 11. State whether you yourself ever constructed any such pencil-erasers—that is, pencils with rubber in one end, enclosed in the wood, and lead in the other, and, if so, at how early a date, how many, and for how long a time, and for what purpose.

(Objections continued.)

Ans. I always prepared my own erasers after that. Sometimes I would take a piece of pencil, sometimes a round stick. I would insert a piece of rubber in the end, tie it in, and use it for an eraser. I
807 would sometimes use carpenter's pencils. I couldn't say how many; but always when I wanted one, after I learned how to do it. Perhaps as early as 1856 or 1857. I couldn't say exactly. I used the one Mr. Dunton gave me until I used it up or lost it. Couldn't say how long I made them; several years. Haven't made any for quite a number of years.

Int. 12. How long, subsequent to 1855, did you continue in the business of teaching penmanship and book-keeping?

(Objection continued.)

Ans. I haven't taught, only occasionally, since 1862. Taught in the public schools considerably.

(Question repeated.)

Ans. Until 1862.

Int. 13. And state whether or not you continued to make and use such pencils up to 1862.

(Objected to as leading. Objections continued.)

Ans. I did, sir. Always made them when I had occasion to use such.

Int. 14. Do you know whether Mr. Dunton when you called on him, as you say, in the spring of 1855, was getting up copy-books for publication?

(Same objection. Objections continued,)

Ans. I think he told me he was then.

(Answer objected to as hearsay.)

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Are you the author or publisher of any series of copy-books?

Ans. Simply co-author with Mr. Dunton.

Cr.-int. 2. When did you last make any copies for the engraver on any occasion?

808 Ans. It was 1859 or 1860. I couldn't tell you, sir, exactly.

Cr.-int. 3. Please explain what you mean by co-author with Mr. Dunton.

Ans. I bought of Mr. Dunton a portion of his copyright, and had my name simply put on to the books.

Cr.-int. 4. When was that purchase made, and did you make any of the copies in those books?

Ans. No, sir; I did not. A little over a year and a half ago, as near as I can recollect.

Cr.-int. 5. What was the title of the set of copy-books which you got up, and Mr. Boynton engraved for you, and when were they first published?

Ans. They were first published in 1855. "Herriman's Condensed System of Rapid Writing." They were copyrighted in Portland, Maine.

Cr.-int. 6. Subsequent to the time referred to, when you made the copies last mentioned, did you make any other copies for the engraver; and, if so, when?

Ans. The same year, I think, I wrote up a writing-primer that was engraved by Mr. Boynton. That was all that I got up directly, on my own account. I've bought a series of books since that, and added something to them. As near as I can recollect, it was in 1859 or 1860.

Cr.-int. 7. When did you leave the Maine State Seminary?

Ans. I never resided there. I only went there occasionally; 1858 was, I think, the last of my teaching there. I couldn't say, certain.

Cr.-int. 8. Where did you reside from 1855 to 1858, inclusive?

Ans. Auburn, Maine.

Cr.-int. 9. How long did you continue to reside there?

Ans. I think I left there in 1868, sir; in 1867 or 1868.

Cr.-int. 10. Have you a place of business in Boston, now?

Ans. Nothing but an office.

Cr.-int. 11. How long have you had an office here?

809 Ans. I have been located at three different places in Boston, since I have been connected with these books, "The University Series of Copy-books."

Cr.-int. 12. Are those the books in which Mr. Dunton and yourself are jointly interested?

Ans. Yes, sir.

Cr.-int. 13. Where did you see Mr. Dunton in Boston in the spring of 1855?

Ans. At a place on Washington street, where he was stopping, near 226 to 228. I couldn't tell you exactly, as it was but once that I was there.

Cr.-int. 14. Were those his writing-rooms where he taught penmanship?

Ans. I don't know, sir; it's where I found him. He said that he was writing up his copies, or getting up his books; finishing up his books; something of that kind, and he was very busy.

Cr.-int. 15. Please look at defendant's pencil exhibits, which the examiner will show you, and select therefrom any which you may find—if you find any at all—the same, or substantially the same as the pencil with rubber in it which you say Mr. Dunton gave you, or those which you say you subsequently made yourself.

(Said exhibits shown witness as in last deposition.)

Ans. I used to use something similar to that, myself. (Exhibit U U selected.) The one he gave me was similar to that, but it had no rubber in it, (Exhibit D D selected,) the style for marking cards. I'm unable to tell you what make it was. I don't remember. It was that color; I think not so well finished as one of those, (Exhibits P P, Q Q;) the roughness resembles that, (P P, P P.) The size is like that, (Q Q.) I think that is the pencil it resembles most, (Exhibit K K.) This is all from recollection, you must know.

Cr.-int. 16. Which end of the carpenter-pencils in which you put rubber like Exhibit U U, did you use to employ?

Ans. I used to take this kind of a pencil, and put it into warm
810 water, so that the glue would start, and raise it a little and insert my knife and break out the lead and insert the rubber. I never was very nice about it. I used to tie it round with a thread.

Cr.-int. 17. I mean, did you have any use, and, if so, what, for the end of the carpenter's pencils opposite that from which you took the lead and put in the rubber?

Ans. None.

Cr.-int. 18. When did you first mention the fact of your having had this pencil from Mr. Dunton, and made them yourself as you have mentioned?

Ans. But a short time ago; two or three weeks, perhaps.

Cr.-int. 19. Please state by whom your attention was first called to the subject.

Ans. By Mr. Dunton.

Cr.-int. 20. Has he spoken to you since on the subject?

Ans. He has.

Cr.-int. 21. On any of the occasions when he has spoken to you has he shown you any specimens of pencils such as those you have referred to, especially the carpenters' pencils?

Ans. He show' me a pencil some two weeks ago, saying he had been trying to find some pencils like it. That was one of the small ones. I think he said he was unable to. If there was rubber in the end of that, I didn't notice it. He said it was a particular kind of pencil; that the lead was very tough.

Cr.-int. 22. How long have you resided in Medford?

Ans. Four years next December.

Cr.-int. 23. How long is it since you have had any office or place of business in Boston?

Ans. Two years.

Cr.-int. 24. Have you been at those offices continuously during that time?

Ans. Occasionally. I have travelled some of the time. I have travelled most of the time. It would be a difficult thing to state when I've been off.

Cr.-int. 25. Have you seen Mr. Dunton during the times you have been here?

811 Ans. Only occasionally.

Cr.-int. 26. Was he here last winter, and did you see him then?

Ans. I did.

A. HERRIMAN.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Sept.* 22, 1873.

(Same notice as to striking out as in former depositions.)

MONDAY, *September* 22.

A. R. DUNTON recalled by defendants.

Int. 1. Have you ever seen or had in your possession a certain letter written by William L. King, of Brockport, N. Y., and dated on or about May 15th, 1870, addressed to Francis Gardner, principal of the Boston Latin School, in relation to your trouble in Brockport; and, if so, where is now said letter?

(Objected to as irrelevant, immaterial, and incompetent.)

Ans. I had one given to me by Mr. Gardner. That letter was burned, with many of my things, at the time of the big fire last November.

Int. 2. Calling your attention to the subject of the time spent by you in Newburyport in 1855 and 1856, if, upon reflection, your recollection enables you to state any more definitely than you did on your former examination, please do so.

Ans. I think I went there—I'm pretty sure—in October first, and I spent the winter there; most of the winter; I think till about March. I went away occasionally to assist Mrs. Dunton at Farmington, Ct.

812 Int. 3. Do you mean that after you went there in October—that is, to Newburyport—you remained there continuously until next spring?

Ans. I went away, as I have said, a few times. I did not remain continuously.

Cross-interrogatories by E. Wetmore, esq., for defendant, and answers of witness thereto:

Cr.-int. 1. When did Mrs. Dunton go to Farmington, and when did she leave there?

Ans. I am not able to tell. It was in January or February, I think.

Cr.-int. 2. Did Mrs. Dunton go with you when you first went to Newburyport?

Ans. I'm not able to say; I don't recollect.

Cr.-int. 3. Did you have any other absences from Newburyport between October and January except the absence you have stated, when you say you went to Maine with Mrs. Dunton?

Ans. I don't recollect. I know I was at New Haven, but it may have been I had stopped at those placee when I went to assist Mrs. Dunton. I'm not able to say all the places.

Cr.-int. 4. From what place in Maine did you go to Camden?

Ans. From Rockland, I think. I went from Camden to Belfast; started to go with Mrs. Dunton, but came back after going as far as Lincolnville; started again, and went through on the stage, being the first time I ever went through on the stage.

A. R. DUNTON.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, *Sept.* 22, 1873.

813 UNITED STATES OF AMERICA,
State and District of Massachusetts, Suffolk, ss:

I, Frederic Dodge, a notary public within and for said county and State, duly commissioned and sworn, do hereby certify:

That in a certain civil suit in equity, pending in the circuit court of the United States for the southern district of New York, wherein Joseph Reckendorfer is complainant and Eberhard Faber is defendant, being duly appointed a special examiner under the 67th rule of said

court, to take testimony in said cause in said district of Massachusetts, and in the district of Maine, as by the annexed copy of an order of said court appears, and being duly furnished with a copy of the bill and answer in said cause:

On the 3d, 4th, 5th, and 6th days of September, 1873, at Camden, Maine, and afterwards by adjournment on the 15th, 16th, 17th, 18th, 19th, 20th, and 22d days of said September, at Boston, in said county, as in the foregoing depositions more particularly appears, personally appeared before me the before-mentioned Martin V. Tower, William R. Matthews, George W. White, Wm. H. Hodges, Albion Drake, Miles Fuller, Warner C. Tower, Martin W. Tower, Julia A. Harwood, Lyman P. Harwood, Francis M. Tower, Elizabeth B. Dunton, George W. Dunton, Ermina G. Dunton, and Seldom D. Wiley, at said Camden, Maine, as above, and John H. Morison, James M. Robbins, Albert K. Teele, Thomas H. Hinckley, Stillman L. Tucker, Lorenzo J. Matthews, Daniel O. Quimby, James H. White, John S. Washburn, George H. Bundy, George L. Burt, Elbridge Blackman, Alfred Foster, Simeon Emerson, Benjamin C. Vose, George Penniman, A. P. Blake, Wm. H. Norton, Alden Crockett, Peter Thacher, John F. Milliken, John M. Whittemore, Cyrus G. Spaulding, Chas. A. Evans, Augustus Meisel, Chas. W. Hill, James H. White, Alvin R. Dunton, H. L. Bradford, Jos. P. Waterhouse, Horace G. Tucker, Ambrose Herriman, at said Boston, as above, witnesses for the defendant in the above-entitled action, who were all of sound mind and lawful age; and said witnesses having been by me first cautioned and sworn to testify the whole truth relative to the issue, gave severally the foregoing depositions in answer to interrogatories proposed by counsel for defendant and complainant, respectively, as therein more particularly appears, and the testimony given by them was by me reduced to writing in presence of said deponents, who were examined separately and apart from each other; and they each afterwards subscribed the same in my presence, as and for their depositions.

814

Said depositions were taken by consent, Messrs. John S. Washburn and P. Thacher, esqs., appearing for defendant, and Messrs. Chas. F. Blake and E. Wetmore, esqs., for complainant, due service of the annexed notice having been admitted, as thereon appears.

The reason for taking said depositions is, that the testimony of said deponents is material and necessary in said above-named action, and that they all reside more than one hundred miles from the place of trial of said cause, to wit, in the districts of Maine and Massachusetts.

Said adverse party were present at the taking of said depositions by their counsel, Messrs. Chas. F. Drake and E. Wetmore, esqs., and put such interrogatories as they thought fit, as hereinbefore more fully appears.

815

I further certify that I am not of counsel or attorney for either of the parties in said cause, nor in any way interested in the event thereof.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, this twenty-second day of September, 1873.

(Signed) FREDERIC DODGE,
Notary Public.

FEES.

Witnesses.	Att.	Travel.	
Martin V. Tower	2 days.	3 m	$3 30
Wm. R. Matthews	1 "	20 "	2 50
Geo. W. White	1 "	16 "	2 30
Albion Drake	1 "	16 "	2 30
Miles Fuller	1 "	16 "	2 30
Warner C. Tower	1 "	16 "	2 30
Martin W. Tower	2 "	16 "	4 00
Julia A. Harwood	1 "	2 "	1 60
Lyman P. Harwood	1 "	1 "	3 10
F. M. Tower	3 "	20 "	5 50
Eliz. B. Dunton	2 "	2 "	3 10
Geo. W. Dunton	2 "	2 "	3 10
Ermina G. Dunton	1 "	1 "	1 60
Seldom D. Wiley	4 "	2 "	6 10
Services of 2 subpœnas			50
" "			28 50
John H. Morison	1 day.	14 m	2 20
James M. Robbins	1 "	14 "	2 20
Alfred K. Teele	1 "	14 "	2 20
Thos. H. Hinckley	1 "	14 "	2 20
Stillman B. L. Tucker	1 "	14 "	2 20
Elbridge Blackman	1 "	14 "	2 20
Alfred Foster	1 "	14 "	2 20
Simeon Emerson	1 "	14 "	2 20
Benjamin C. Vose	1 "	14 "	2 20
George Penniman	1 "	14 "	2 20
Alpheus P. Blake	1 "	14 "	2 20
816 Wm. H. Norton	1 day.	400 m	21 50
Alden Crockett	1 "	400 "	21 50
Peter Thacher	1 "	1 "	1 60
John F. Miliiken	1 "	2 "	1 70
Lorenzo J. Matthews	2 "	4 "	3 20
Daniel O. Quimby	3 "	2 "	3 10
James H. White	1 "	2 "	1 60
John S. Washburn	1 "	2 "	1 60
Geo. H. Bundy	3 "	4 "	4 70
John M. Whittemore	3 "	2 "	4 60
Cyrus G. Spaulding	1 "	2 "	1 60
Chas. A. Evans	3 "	2 "	4 60
Jos. P. Waterhouse	2 "	2 "	3 10
Horace G. Tucker	2 "	2 "	3 10
Ambrose Herriman	3 "	2 "	4 60
Three subpœnas			75
Service on Milton witnesses			7 00
" Boston "			5 00
			$192 15
Magistrate taking			250 00
			$442 15

F. DODGE,
Examiner.

It is agreed by counsel that the foregoing record be transmitted to E. G. Thompson, esq., 29 Nassau street, N. Y., as was the former record of defendant's evidence in April last.

F. DODGE,
Examiner.

817 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

It is hereby consented that Frederick Dodge be appointed special examiner to take testimony in the district of Massachusetts in the case of Joseph Reckendorfer vs. Eberhard Faber.

Dated New York, March 7, 1873.

KELLER & BLAKE,
Solicitors for Complainant.
JOHN S. WASHBURN,
Solicitor for Defendant.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

Upon reading and filing the consent of counsel herein, it is hereby ordered that Frederick Dodge be, and he is hereby, appointed special examiner to take testimony in the district of Massachusetts in the case above entitled.

New York, March 7, 1873.

SAMUEL BLATCHFORD.

A copy.

KENNETH G. WHITE, *Clerk.*

818 Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

It is hereby consented that Frederick Dodge, esq., heretofore by order of this court of March 7, 1873, appointed special examiner to take testimony in this suit in the district of Massachusetts, be also appointed special examiner to take testimony in this suit in the district of Maine; and also that such of the exhibits in this suit now in the custody of E. G. Thompson, esq., U. S. examiner, of New York City, as and when required by defendant's counsel, be by said Thompson transmitted to said Dodge, to be retained by said Dodge, in his personal custody, for the purposes of his said appointment, and by him to be returned to said E. G. Thompson, examiner, upon the expiration of defendant's time for taking rebutting testimony herein.

Dated New York, August 20, 1873.

KELLER & BLAKE,
Complainant's Solicitors.
JOHN S. WASHBURN,
Defendant's Solicitor.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER. }

Upon reading and filing the annexed consent of counsel herein, it is hereby ordered that Frederick Dodge, esq., heretofore by order of
819 this court of March 7, 1873, appointed special examiner to take testimony in this suit in the district of Massachusetts, be also appointed special examiner to take testimony in this suit in the district of Maine; and also that such of the exhibits in this suit now in the custody of E. G. Thompson, esq., U. S. examiner, of New York City, as and when required by defendant's counsel, be by said Thompson transmitted to said Dodge, to be retained by said Dodge, in his personal custody, for the purposes of his said appointment, and by him to be returned to said E. G. Thompson, examiner, upon the expiration of defendant's time for taking rebutting testimony herein.

Dated New York, Aug. 23, 1873.

(Signed) SAMUEL BLATCHFORD.

(A copy.)

KENNETH G. WHITE,
Clerk.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER } In equity.
vs.
EBERHARD FABER. }

Take notice that on the 24th day of September, 1873, at the office of Joseph D. Husbands, No. 143 Power's Building, Rochester, in the State of New York, at ten o'clock in the forenoon, the defendant in this suit will take testimony herein before a proper officer, and testimony
820 will also, if required, be taken before him by adjournment from day to day at Palmyra, Batavia, and Brockport, in said State.

Dated New York, Sept. 17th, 1873.

JOHN S. WASHBURN,
Defendant's Solicitor.

To Messrs. KELLER & BLAKE,
Complainant's Solicitors.

(Endorsed:) U. S. circuit court, southern district of New York. Joseph Reckendorfer vs. Eberhard Faber.

Notice of taking testimony on behalf of defendant, in Rochester, New York, &c. John S. Washburn, respondent's solicitor. Service of the notice of which the within is a copy is hereby admitted.

September 17th, 1873.

KELLER & BLAKE,
Complainant's Solicitors.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER, COMPLT., } In equity.
vs.
EBERHARD FABER, RESPT. }

It is hereby consented that Martin W. Cooke be appointed special ex-

aminer to take testimony in this suit in the northern district of New York.

Dated New York, September 22, 1873.

KELLER & BLAKE,
Complainant's Solicitors.
JOHN S. WASHBURN,
Defendant's Solicitor.

821 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER, COMPLT., *vs.* EBERHARD FABER, RESPT. } In equity.

Upon reading and filing the annexed consent counsel herein, it is hereby ordered that Martin W. Cooke be, and he is hereby, appointed special examiner to take testimony in this suit in the southern district of New York.

Dated New York, September 24, 1873.

(Signed) SAML. BLATCHFORD.

A copy.

KENNETH G. WHITE, *Clerk.*

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER, COMPLT., *vs.* EBERHARD FABER, RESPT. } In equity.

Be it remembered that on the 24th day of September, 1863, before me, special examiner to take testimony in this suit in the northern district of New York, appointed upon stipulation of the solicitors for the respective parties herein, by an order of the said United States circuit court, at the city of Rochester, in the State of New York, appeared the said parties, by their respective counsel, to wit: E. Wetmore, esq., counsel for said complainant, and Stephen Thacher, esq., counsel for said defendant, and the following witness', to wit: Charles Sumner,
822 William L. King, and A. Sidney Pratt, appeared at the same time and place, and being by me duly sworn to testify, &c., in the said suit, &c., did testify and give evidence as follows, that is to say:

And the said CHARLES SUMNER being carefully examined and cautioned and duly sworn to testify to the truth, the whole truth, and nothing but the truth, did testify as follows, to wit:

Interrogatories:

1. Q. What is your name, age, residence, and occupation?

A. My name is Charles Sumner; my age, fifty-two years; my residence, No. 14 South Clinton street, Rochester, N. Y.; my occupation, practising physician.

2. Q. Where were you educated for your profession, where did you graduate, and how long have you practised as a physician?

A. I was educated at New York University and Pennsylvania Medical College. I graduated at Medical College of Pennsylvania, and have practised medicine twenty-seven years.

3. Q. Did you attend and prescribe for Alvin R. Dunton, writing-master, on or about September 18, 1861, and subsequently at various

times during the fall of 1861, at said city of Rochester? If yes, please state, as particularly as your recollection permits, the condition in which you found said Dunton.

(This question was objected to as not in rebuttal of plaintiff's evidence in reply, immaterial, irrelevant, and incompetent to affect the record of said Dunton's conviction.)

A. I did attend said Dunton, and found him, as near as I can remember, very weak in body and mind—more particularly in mind. He seemed rather indifferent to matters and things in general—not able to collect his ideas very readily. He answered questions put to him very slowly and in rather an indifferent manner. There was
823 rather more than ordinary heat in his head. He had cold feet and hands. He was suffering very much from indigestion and constipation. That wasabout the condition I found him in. I found him lying in bed. I don't remember the number of times I saw him. It was, perhaps, five or six times. I presume I saw him oftener, besides the times I prescribed for him. I was attending other members of the family at the time—the family where he boarded. This was at the time he was there.

4. Q. State if you know what family said Dunton boarded in during the fall of 1861 at said Rochester, and how long he boarded with them.

(The same objection continued.)

A. He boarded with the family of J. V. R. Chapman; I could not positively state how long—some number of weeks I should think.

5. Q. What period of time did your visits to said Dunton cover during the fall of 1861?

(The same objection continued.)

A. I think it was about three weeks, as near as I can remember. I don't remember of his being specially under my care more than three weeks. I saw him before and sometimes after.

7. Q. Did you see him in November of that fall?

(The same objection continued.)

A. I think I did.

7. Q. Please state what the nature of Mr. Dunton's disease was.

(The same objection continued.)

A. I pronounced it a form of insanity, what we term dementia.

8. Q. In your opinion, as a medical man, did you consider said Dunton, during the time you say you saw him through said fall, morally responsible for his acts?

824 (The same objection continued, and objected further as calling for an opinion upon a subject-matter in reference to which the opinion of witness is inadmissible.)

A. I should not consider him as morally responsible for his acts at the time that I saw him—for all his acts.

Cross-interrogatories.

Cross-examined de bene:

1. Q. What experience have you had in the course of your practice in the treatment of insanity?

A. Probably about the same that any ordinary physician would have in the same amount of general practice of medicine.

2. Q. Have you made the study and treatment of insanity a specialty?

A. I have, to a certain extent, as far as cases have come under my general practice.

3. Q. Have you had any experience in the treatment of the insane at hospitals or institutions devoted to that purpose?

A. No, sir; I have not.

4. Q. Have you had any other experience or observation of insanity, except as it has appeared as an incident to the diseases you have been called upon to treat?

A. No.

5. Q. From what facts in the case of A. R. Dunton, mentioned in your direct examination, did you form the opinion that it was a case of dementia?

A. I formed my opinion from the facts stated in my answer to the third direct interrogatory on my direct examination.

6. Q. Will you please define dementia, as distinguished from other forms of insanity?

A. It is a weakened condition of the mind, brought on by overexertion, mentally and physically. It may be caused by irregularities in diet, and from constipation; and it may be caused from long-continued powerful treatment for other diseases—debilitating treatment you
825 might say, from hemorrhages from metastases, and the temporary suspension of customary evacuations. Those are the causes that might produce acute dementia.

7. Q. By what especial symptoms do you distinguish in your diagonosis of dementia mental impairment amounting to insanity, and general nervous exhaustion not amounting to insanity?

A. I take the symptoms together in making up the diagonsis, as I have heretofore described. In dementia, causing insanity, there is more of a weakened condition of mind than in nervous debility. In nervous debility we get more activity of the mind at intervals during the course of the disease.

8. Q. Please state what particular symptoms, indicating dementia, as distinguished from nervous exhaustion, you found in Alvin R. Dunton.

A. I found all those symptoms as I have described which we do not find in case of nervous exhaustion, or most of the symptoms. In nervous debility we find more restlessness of the body than we do in dementia.

9. Q. Then, were the only symptoms from which you pronounced Alvin R. Dunton suffering from dementia those which you have enumerated in your answer to the third direct interrogatory, to which you have already referred?

(The said interrogatory and answer were here read to the witness.)

A. There were some other symptoms which I might have mentioned, such as moaning, holding up his hands on his head, lying on his face and burying his face in the pillow a portion of the time. That is about all, as near as I can recall. He wished to be left alone, and didn't want any one around him.

10. Q. Have you now enumerated all the symptoms from which you pronounced the case one of dementia?

A. I have, as near as I can remember; there may have been other symptoms which I don't remember; it is twelve years since I treated the case.

826 11. Q. Do you remember what treatment you prescribed?

A. I presented cold applications to the head, warm applications to the feet, and directed some particular regimen, gentle exercise, bathing, and general remedies to remove the exciting causes, such as indigestion, constipation, and so forth.

12. Q. Do you regard dementia as curable?

A. I do, sir, in the acute form.

13. Q. What do you define acute dementia to be?

A. I described the symptoms of acute dementia in the answer above, or the causes of it.

14. Q. Who are some of the best standard and elementary authors on the subject of insanity, and especially those who have treated of dementia?

A. Ray is one, Beck is another. There are other authors I have read, but they don't occur to me just now.

15. Q. I do not refer to authors upon medical jurisprudence, but to the authors of purely medical treatises upon the subject inquired of.

A. I refer to authors upon medical jurisprudence.

16. Q. Can you mention the names of those authors whom you regard as standard authority upon the subject of insanity, without regard to its relations to the subject of medical jurisprudence?

A. I don't remember now the authors who have made that a speciality. I am a poor hand to remember names.

17. Q. Dr. Ray's authority upon that subject is very high, is it not?

A. It is so considered, and Beck is also a standard authority.

18. Q. How is Brown-Siquard esteemed in the profession as an author upon nervous diseases?

A. He stands high with some; I don't know much about that, having never perused it; I have heard it highly spoken of.

Redirect examination:

827 1. Q. Do you consider Ray's and Beck's works as treating of insanity alone, or of insanity in connection with medical jurisprudence?

(The same objection as above.)

A. I consider them as treating of insanity in connection with medical jurisprudence.

Recross-examination resumed:

1. Q. Did you regard A. R. Dunton's case one of emotional insanity?

A. I think not.

CHARLES SUMNER.

Taken, subscribed, and sworn to before me this 24th September, 1873.

MARTIN W. COOKE,
Examiner.

And the said WILLIAM L. KING being carefully examined and cautioned and duly sworn to testify to the truth, the whole truth, and nothing but the truth, did testify as follows, to wit:

Interrogatories:

1. Q. State your name, age, residence, and occupation.

A. William L. King is my name; I am 47 years of age; I reside in Brockport, N. Y.; my occupation is dry-goods business.

2. Q. Did you prosecute Alvin R. Dunton, writing-master, in October, 1861, on the charge of petit larceny?

(Objected to as immaterial and irrelevant, not in rebuttal of plaintiff's evidence in reply, incompetent to affect the record of said Dunton's conviction, and also as expressing a legal impossibility.)

A. I think I did, as I understood it at the time.

3. Q. Did you make complaint against said Dunton on such charge before Austin Harmon, justice of the peace, at Brockport, at the time aforesaid?

(The same objection except the objection as to form.)

828 A. Yes, sir.

4. Q. Please state whether subsequent to said complaint you made inquiries concerning said Dunton's condition of health, and what the result of such inquiry, if any, was.

(The same objection continued.)

A. I did make the inquiries, and the conclusion I came to was that his mind was disordered, that he was not in his right mind.

(This answer was further objected to as hearsay, and stating the opinion of the witness in reference to a subject upon which his opinion was not shown to be competant.)

5. Q. To what time did your said inquiries, referred to in your last answer, have reference?

(The same objection continued.)

A. To the time right away after the arrest—say the next day, and from that time forward, for two, three, or four weeks.

6. Q. State whether you made such inquiries with reference to said Dunton's condition of health as it was prior to and at the time of his arrest aforesaid, as well as subsequently thereto.

(The same objection continued.)

A. Yes, sir.

7. Q. Please look at the paper now shown you and state whether you wrote a letter to Francis Gardner, principal of the Public Latin School, in Boston, Mass., on or about May 15, 1870; if yea, state whether said paper is a copy of such letter, and whether you gave an affidavit of the same purport during the spring of 1870.

(The same objection as before, and further objected to as both parol and secondary evidence of the contens of written instruments, no foundation for such parol or secondary evidence having been laid.)

829 A. I wrote to Mr. Gardner about this time. I think this is a copy. I think I made an affidavit to the same purport about the same time. The said paper was then offered in evidence by defendant, and marked "Defendant's Exhibit X X, M. W. C., Examiner, &c., Reckendorfer vs. Faber, Sept. 24, 1873."

(The paper objected to as not in rebuttal, irrelevant, immaterial, incompetent, and secondary evidence.)

8. Q. Where is Myron H. Hunt?

(The same objection continued.)

Ans. He is dead.

9. Q. Please state whether on the 13th September inst. you called on the district attorney of Monroe County, and, if so, what you stated to him.

(The same objection continued.)

A. I called on the district attorney on the 13th September inst., and stated to him that I wished no further notice taken of the matter in regard to Mr. Dunton's affair. We had some conversation, but I cannot give the whole of it. That is the sum and substance of it.

10. Q. What do you mean by Mr. Dunton's affair?

A. It was, that I had had him, years ago, arrested. I found afterwards that I considered myself in the wrong; that I was doing him injustice, and that I wanted to correct it and have the matter dropped.

Cross-examination de bene esse:

Cross-interrogatories:

1. Q. At whose request did you call on the district attorney?

A. Mr. Thacher's.

2. Q. Did you tell the district attorney that you wished him to make no opposition to any proceeding for the purpose of attempting to set aside the conviction of Mr. Dunton, made twelve years ago?

830 A. I requested the district attorney that there be no further proceedings in the matter against Mr. Dunton, in regard to this arrest or theft, as you might term it.

3. Q. What further proceedings did you understand were in progress?

A. I didn't know there was any, but my wishes were that there should not be any.

4. Q. Did you suppose that after a man had been convicted for larcency, and sentenced to the penitentiary for three months, twelve years ago, no further proceedings being in the mean time *been* had, that any further proceedings against the person convicted were possible at the time when you called upon the district attorney?

A. I don't know that he was ever sentenced for three months. I don't know that he ever had a trial.

5. Q. What reason had you to believe that the district attorney of this county was about to take, or could take, any proceedings against A. R. Dunton, based upon your complaint before Austin Harmon, justice of the peace, twelve years ago?

A. I don't know as he had any such intention. I don't know that he could.

6. Q. Did you make the affidavit on which Mr. Dunton was arrested?

A. I think I did.

7. Q. Did you swear to it?

A. To the best of my recollection, I did.

8. Q. Are the statements in that affidavit true?

A. Any statement that I made I believed to be true at the time I made it.

9. Q. Did you yourself compose as well as write the original of which you say Exhibit X X is a copy?

A. Not in full.

10. Q. Who did?

A. I couldn't tell you, sir.

11. Q. Don't you know the name of the person?

A. I do not.

12. Q. Did you ever see him?

A. Not to my recollection, sir.

13. Q. The letter refers to an affidavit given by you to one Mr.

831 A. E. Burnett. How long before the letter was sent did you make that affidavit?

A. I couldn't tell whether it was one, two, three, or four years. I couldn't tell what year it was in.

14. Q. Did you make the inquiries referred to in this copy of a letter about the time the letter was written?

A. No, sir.

15. Q. How long before?

A. Say 1861; at the time this thing first started.

16. Q. Was the affidavit given to A. E. Burnett before or after you made the inquiries?

A. After.

17. Q. Did you make any statement in that affidavit relative to your having made the inquiries?

A. I think not.

18. Q. Of whom did you inquire?

A. Of different ones. I couldn't tell how many; perhaps a dozen or more.

19. Q. Can you not state the name of any one? If so, do so, and all.

A. Austin Harmon, justice of the peace; H. N. Beach; the constable—I cannot give his name—and how many others I cannot tell you. J. D. Husbands, Mrs. Dunton, were others.

20. Q. Were any of the parties of whom you inquired present when Dunton stole the dress?

A. No, sir.

21. Q. A search-warrant was issued, was there not, and the goods found in Dunton's lodgings?

A. A search-warrant was issued and a part of the goods found in Dunton's lodgings.

22. Q. There had been a series of thefts committed there, had there not, at about that time, in the same store, suspicion of which attached to Dunton, which led to a watch being placed upon him and his detection?

A. Yes, sir.

23. Q. And he was found by the officer who arrested him concealed in a barn, was he not?

A. The first I knew he found him in his room, where he went with a search-warrant.

832 24. Q. Have you any doubt that Dunton took the dress?

A. There are two dresses in question. I know he took one.

25. Q. Do you believe he intended to pay for it?

A. I don't think he did.

26. Q. Did you see him take it?

A. Yes, sir.

27. Q. Did he conceal it when he took it under his clothing?

A. He concealed it after he took it.

Redirect examination resumed:

1. State the contents of the affidavit which you gave A. E. Burnett, as referred to in Exhibit XX, of defendant?

(The same objections as above and as parol evidence of the contents of a written instrument.)

A. It was merely the facts that I had had A. R. Dunton arrested for stealing, and that I found the goods in his possession.

2. Q. Did said A. E. Burnett tell you why he wanted said affidavit; and, if so, what did he say?

(Same objections as above, and as hearsay.)

A. He didn't tell me what use he was going to put it to.

3. Q. Did you know at the time you gave said affidavit to said Burnett that he was connected with the publishers of a series of writing-books in opposition to said A. R. Dunton's writing-books?

(The same objections as above.)

A. No.

4. Q. Referring to third cross-interrogatory and the answer thereto, (the same being now read to the witness,) please explain what you mean by saying "My wishes were that there should not be any."

833 State whether you meant any proceedings against said Dunton, or in his favor?

(The same objections as above.)

A. I meant there should be no further proceedings against him.

W. S. KING.

Taken, sworn, and subscribed before me this 24th September, 1873.

MARTIN W. COOKE,
Examiner, &c.

And the said A. SIDNEY PRATT, being carefully examined and cautioned and duly sworn to testify the truth, the whole truth, and nothing but the truth, did testify as follows:

Interrogatories:

1. Q. Please state your name, age, occupation, and place of residence.

A. Algernon Sidney Pratt; aged sixty-four years; teacher of the art of *arts of* writing. I reside at Batavia, Genesee County, N. Y.

2. Q. Do you know Alvin R. Dunton, writing-master? If so, state when and where you first became acquainted with him?

A. I do know him. I first became acquainted with him at Rochester, N. Y., in 1860, 1861, or 1862.

3. Q. State whether you saw said Dunton at the house of J. V. R. Chapman in the year 1861; and, if so, in what part of said year?

A. I saw him there in November, I should think—the fore part, I should think. It was then or the latter part of October, 1861.

4. Q. Did you know about said Dunton's trouble at Brockport?

834 A. I had heard by report—that is all.

5. Q. How near the time when you so heard of said trouble did your said visit at said Chapman's, where you saw said Dunton, occur?

(Objected as not in rebuttal, immaterial, and irrelevant.)

A. I heard the report a few days before I saw said Dunton at Chapman's.

6. Q. When you so heard of said trouble did you understand that it had shortly previous taken place?

(The same objection, and as leading.)

A. I did; some days or weeks previous.

7. Q. State whether you had opportunity to observe, and whether you did observe, the appearance and actions of said Dunton at the time of your said visit at said Chapman's. If yea, please state what they were.

(The same objections continued, except as to form.)

A. I did; his actions and appearance were rather peculiar, I thought, for a sane person. He was a singular kind of a person. I thought *a thought* at the time he appeared to be kind of lost and somewhat kind of crazed. He was sick and confined to the house.

(This answer is objected to as irresponsive and expressing an opinion upon a subject in regard to which the witness is not proved to be an expert.)

8. Q. State whether said Dunton subsequently made a visit, shortly after you saw him at Chapman's, at your house in Batavia; and, if so, please say what his condition then was.

(The same objection continued, and as calling for an opinion.)

A. He did make a visit at my house shortly after—some two months—it might have been three. He came and stayed some three weeks

835 at my place in Batavia. His bodily health was better than when I saw him at Chapman's, but in other respects he seemed to be flighty at times—more particularly at night. He would be out around hunting for Laura, his wife.

Cross-interrogatories:

Cross-examined de bene:

1. Q. Did he appear to be kind of lost while he was at your house?

A. At times he appeared so.

2. Q. Did any articles of value appear to be lost after he left?

A. Not any.

3. Q. Was one of the peculiarities that he exhibited that of not always stating the truth?

A. I never heard him say anything that I thought was false; not that I remember. He had a great deal of trouble about his publications and those of other houses.

4. Q. Are you sure that the time when you saw Mr. Dunton was not in the year 1860?

A. I am not sure whether it was in 1860, 1861, or 1862. It was the same year and a few days after the Brockport affair.

A. S. PRATT.

Taken, sworn, and subscribed before me this 24th September, 1873.

MARTIN W. COOKE,
Examiner, &c.

836 EXHIBIT XX.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

Defendant's Exhibit XX, Sept. 24, 1870, M. W. C., examiner.

BROCKPORT, 15*th May*, 1870.

FRANCIS GARDNER, Esq.,
Public Latin School, Boston:

DEAR SIR: Yours of May 12th is at hand in regard to one Mr. A. R. Dunton.

I am the person who prosecuted Mr. Dunton, as stated in an affidavit (a copy of which you inclosed) given one Mr. A. E. Burnett, whom, I have since learned, was a runner or agent for a Boston house, publishing an opposition series of writing-books.

Fearing, afterwards, that I had done Mr. Dunton a wrong, I took pains to learn all the facts in the case possible, and I have fully satisfied myself that he was not in the least to blame in the matter, for reasons best known to myself, and I regret exceedingly having made that prosecution or having given such affidavit.

I have no doubt Mr. Dunton was honest in the transaction, and believe him every way worthy of public patronage.

Very truly, yours,

W. L. KING.

837 United States circuit court, southern district of *of* New York.

JOSEPH RECKENDORFER, COMPLAINANT,
vs.
EBERHARD FABER, DEFENDANT.

NORTHERN DISTRICT OF NEW YORK, *ss:*

I, Martin W. Cooke, of the city of Rochester, N. Y., special examiner in the above-entitled suit, to take testimony therein, in the northern district of New York, appointed by order of the said United States circuit court, upon stipulation of the solicitors of the said parties respectively, do hereby certify that on the 24th day of September, 1873, at the city of Rochester aforesaid, I was attended by the parties to the above-entitled suit by their counsel respectively, and also by the witnesses produced by the said defendant, in pursuance of said order, and such witnesses being of sound mind and lawful age were by me first care-

fully examined and cautioned and sworn to testify to the truth, the whole truth and nothing but the truth in this issue, joined in said suit, and their depositions respectively were by me reduced to writing in the presence of the witnesses respectively, and from their statements severally and respectively, and after carefully reading the same to the said witnesses respectively, they severally subscribed the same in my presence.

And I do further certify that I am not of counsel or attorney
838 for either of the said parties in the said depositions and captions named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand this 27th day of September, 1873.

MARTIN W. COOKE,
Special Examiner, etc.

RECKENDORFER *agst.* FABER.

NEW YORK, *Sept.* 26, 1873—10 a. m.

Met pursuant to notice.
Present, counsel for both parties.

WALLACE DARROW, a witness produced on the part of defendant, being duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. Washburn, as follows:

1. Q. Please state your name, age, residence, and occupation.

A. My name is Wallace Darrow; my age is about 45 years; I reside in New York City, corner of Broadway and 30th street; I deal in surgical instruments, and manufacture them.

Q. 2. Where did you reside and what was your business in 1861 and 1862?

A. I resided in Rochester, New York. I was a bookseller and stationer. My firm was E. Darrow & Brother. My brother's name was Erastus.

3. Q. Were you ever acquainted with Alvin R. Dunton, writing-master; and, if so, when and where?

839 A. Yes, sir, in Rochester, about 12 years ago, I should judge; about 1861.

4. Q. Are you able to fix the time of your acquaintance with said Dunton by or in connection with any event? If so, what?

A. I recollect immediately after, and at the time of the trouble which he had at Brockport, N. Y., was the time of my acquaintance with said Dunton. The trouble in Brockport, to which I have referred, I understood to be that Dunton was accused of petit larceny.

5. Q. Were you or not acquainted with said Dunton prior to said Brockport trouble? And, if so, where and for how long?

A. I was acquainted with him before. He made it his headquarters at our store in Rochester—Darrow & Brother. I don't recollect distinctly how long—some weeks or a short time before.

6. Q. For how long and where were you acquainted with him after said Brockport trouble?

A. In Rochester, New York, the following winter. I don't recollect distinctly the time of leaving. I think he was there the winter following.

7. Q. Where, if you know, was said Dunton living at the time of your said acquaintance with him at Rochester?

A. He boarded with my cousin, J. V. R. Chapman, at Rochester.

8. Q. How frequently during the period of your said acquaintance with said Dunton were you accustomed to see him, and where?

A. I saw him most every day, when he was able to be out. He was confined some to the house, and, I think, he was out of town occasionally. I saw him at our store.

9. Q. How did you know about his Brockport trouble, to which you have referred?

(Objected to as immaterial and irrelevant, and as hearsay.)

A. I presume I got my information from Mr. Chapman.)

840 10. Q. After that did you hear any others speak of it? And, if so, who, and how many, and to what extent, and where?

(Same objection.)

A. My brother knew of it, and it was generally known by those in the store. I don't think it was generally known or made public. I don't recollect distinctly in regard to that point.

11. Q. What did you hear said upon the subject?

(Objection repeated.)

A. It was generally supposed that he was not morally responsible for what he did at Brockport.

11. Q. Why?

(Objection repeated.)

A. He was considered rather erractic, and not exactly right mentally.

13. Q. Did you observe anything in him, or otherwise, which, to your mind, at the time, seemed irrational, and confirmatory of this general opinion?

(Objection repeated, and as incompetent to affect the record of said Dunton's conviction, as calling for an opinion which the witness has not been shown to be competent to give, and as not in rebuttal, and as leading.)

(Question withdrawn.)

14. Q. Describe anything about the conduct or acts of said Dunton, at the time of your said acquaintance with him, which you now remember?

(Objection repeated, except the objection as to form.)

A. He acted rather strange and singular at times. I don't

841 recollect so far back. It was generally thought that he was not right. It was owing to sickness. He had been sick a good deal, and had labored hard.

15. Q. What was your opinion in regard to his acts and conduct at the time, being rational or irrational, or indicating a sane or insane state of mind?

(Same objection as to last question.)

A. Well, my impression would be that he was not right mentally.

16. Q. State what effect, if any, so far as you know, said Brockport trouble, to which you have referred, had upon the estimation of said Dunton and his character with those who knew him in Rochester?

(Same objection.)

A. I don't think that it injured his reputation to any extent; it did not with me.

17. Q. State, if you know, whether said Dunton was under medic treatment while at said Rochester, and, if so, under whose?

(Same objection.)

A. He was, I think, under Dr. Sumner's.

In answer to cross-interrogatories, propounded to him by counsel for complainant, witness testified as follows:

18. X Q. State any particular thing which you yourself ever saw Dunton do, or heard him say, upon which you based your opinion that he was not right mentally?

A. I don't recollect anything particular, but the general impression was that he was not right mentally; he acted rather strange, and did not appear at times exactly rational. That was the general impression there, that it was the cause of his doing as he did at Brockport.

19. X Q. State the names of all the persons then in Rochester who knew Dunton, to your personal knowledge, so far as you can remember them.

842 A. My brother Erastus and Mrs. Chapman, and I think Mr. F. N. Bingham; Dr. Sumner. There was a Mr. Curtis, who was associated with Mr. Chapman. I don't remember whether he was there at the time; I think he was. Then there was J. V. R. Chapman and Lewis Chapman. I don't recollect any others now.

20. X Q. J. V. R. Chapman was associated in business with Dunton as a writing-teacher, was he not?

A. Yes, sir, I believe he was. Mr. Chapman had a college there, and, I think, Mr. Dunton was associated with him in business some way.

21. X Q. Mr. Curtis also associated with him?

A. Yes, sir; I believe Mr. Curtis was one of the teachers. He might have been taking lessons, but I think he assisted Chapman in his school.

22. X Q. Did Lewis Chapman have any relationship or connection, business or otherwise, with J. V. R. Chapman?

A. I think not in business. He was his brother.

23. X Q. Who was Mr. Bingham?

A. He was clerk in our store.

24. X Q. Did Mr. Dunton or Mr. Chapman do business at your store, at any time, as customers?

A. Oh, yes.

25. X Q. Have you now mentioned the names of all the persons whom you can remember, among whom the impression prevailed that Mr. Dunton's Brockport affair was the result of mental aberration rather than moral delinquency?

A. The Chapman family he was most intimate with, boarding there; and my brother—a good many may have known him. I don't recollect all the names—those were the principal ones.

25. X Q. Was there a unanimity of opinion among those who had the impression you have mentioned as to the particular form of Dunton's supposed insanity? Was it regarded as a case of emotional insanity or some other form?

A. I don't know. That was not talked over.

843 Re-direct:

26. R.-D. Q. Have you ever seen or had any communication with A. R. Dunton since that time?

A. I think not, sir, to my recollection.

27. R.-D. Q. Has he ever been in Rochester, or in any place where you resided, to your knowledge?

A. No, sir.

WALLACE DARROW.

Subscribed and sworn to the 26th day Sept., 1873.

E. G. THOMPSON,
Examiner.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

NEW YORK, *Sept.* 26, 1873.

Defendant's counsel offers in evidence certified copy of opinion of Acting Commissioner of Patents on appeal from the board of examiners-in-chief in the matter of the "Interference between the applications of Samuel D. Hovey, Joseph Illfelder, Phillip Hufeland, J. Reckendorfer, and T. H. Müller, for letters-patent for an improvement in 'eraser attachments' to lead pencils," dated Oct. 28, 1872, said copy to be marked "Deft's Exhibit WW, Sept. 26, 1873, E. G. T., Exr."

(Said exhibit objected to as immaterial.)

A. FABER DU FAUR, a witness produced on the part of defend-
844 ant, being recalled, testified as follows in answer to questions propounded to him by counsel for defendant, *as follows*:

1. Q. You are the same person, are you not, who has already been examined as an expert on behalf of defendant in this suit?

A. I am.

2. Q. Please look at defendant's Exhibit NN, now shown you, and state whether, in your opinion as an expert, the same corresponds with, or differs from, complainant's Exhibits 5 and 6, and, if so, in what respect?

(Objected to as not in rebuttal, and immaterial and irrelevant.)

A. Exhibit NN is substantially the same as what is described in Exhibit 5, with the exception of the substitution of the "style" for black lead. It differs from what is shown and described in Exhibit 6, in having a "style" inserted in place of the black lead; in not having one of the ends enlarged, and in not tapering. In other respects it is the same as what is shown and described in Ex. 6.

3. Q. Please look at defendant's Exhibit PP, now shown you, and state whether, in your opinion as an expert, the same corresponds with, or differs from, complainant's Exhibits 5 and 6, and, if so, in what respect?

(Same objection.)

A. Exhibit PP is substantially the same as is shown and described in Exhibit 5, with the exception of the cross-cut in one-half of the sheath, which is not shown in Exhibit 5; with this exception, and also with the exception of its not being enlarged and not tapering at one end, it is the same as that shown and described in Exhibit 6.

4. Q. Please examine defendant's Exhibit QQ in the same manner, and give your opinion?

(Same objection.)

A. My answer is the same as in regard to Exhibit PP.

845 5. Q. (Question repeated as to defendant's Exhibit RR?

(Same objection.)

A. My answer is the same as regards Exhibit PP, with the addition that this exhibit differs in form and dimensions.

6. Q. (Question repeated as to defendant's Exhibit SS?

Same objection.)

A. My answer is the same as in regard to Exhibit PP.

7. Q. (Question repeated as to defendant's Exhibit UU?

Same objection.)

A. My answer is the same as in regard to PP, with the addition that

it differs in form and dimensions, being in those respects substantially like Ex. RR.

8. Q. In your opinion does the "cross-cut," to which you have referred, affect the substantial identity or resemblance of said exhibits to what is shown and described in complainant's said Exhibits 5 and 6?

(Same objection.)

A. It does not affect it; this cross-cut being merely incidental. A man inserting such a rubber, without manufacturing the whole pencil himself, would naturally not split the whole of the pencil for the purpose of inserting the rubber.

In answer to cross-interrogatories, propounded to him by counsel for complainant, witness testified as follows:

9. X-Q. Are the opinions expressed in your answers to the di-
846 rect examination, regarding the alleged identity of the exhibits referred to with what is shown and described in the patents, complainant's Exhibits 5 and 6, based upon your understanding of said patents, as set former examination in this cause?

A. They are.

A. FABER DU FAUR.

Subscribed and sworn to the 26th day of Sept., 1873.

E. G. THOMPSON,
Examiner.

Examination on the part of the defendant closed.

847 Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of BENJAMIN E. DONHAM, taken on behalf of the defendant, at Boston, Mass., Nov. 19th, 1873, before Frederic Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., counsel for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Benjamin E. Donham; Boston, Mass.; am a physician.

Int. 2. Are you acquainted with Silas C. Thomas, now of East Boston; and, if so, how long have you known him, and how did you become acquainted with him?

Ans. I am; since last March; I met him on the street; was introduced to him by Mr. Brandt, now present.

Int. 3. Had you ever seen or heard of him before?

Ans. I had never seen him before; I had heard Mr. Brandt speak of him before as working at Weeks & Potter's.

Int. 4. Since the 17th of March have you seen said Thomas; and, if so, where?

(Objected to as not in rebuttal, immaterial, and irrelevant.)

Ans. I have seen him in my office. He has called on me occasionally.

848 Int. 5. Do you know Joseph Illfelder, now present. If so, how long have you known him?

(Same objection.)

Ans. I have known him since last April, I think.

Int. 6. Do you know Arthur Lincoln, a lawyer, of this city; and, if so, how long have you known him?

(Same objection.)

Ans. I have known him the same length of time that I have known Mr. Illfelder.

Int. 7. Where did you first see me Mr. Illfelder, and when?

(Same objection.)

Ans. I saw Mr. Illfelder at the Parker House, I believe, the first time. I may have seen him before, but that is my remembrance now. I saw him there in April last.

Int. 8. Who was present on that occasion besides yourself and said Illfelder, if any one?

(Same objection.)

Ans. Silas C. Thomas and Mr. Lincoln—Arthur Lincoln.

Int. 9. At what time of day was that interview?

(Same objection.)

Ans. That was in the evening.

Int. 10. How happened you to be there?

(Same objection.)

Ans. I went up with Silas C. Thomas.

Int. 11. Was Mr. Arthur Lincoln there when you first got there?

(Same objection.)

Ans. No, sir, he was not; we went up there with Mr. Arthur Lincoln, from his office in Pemberton square.

849 Int. 12. For what purpose did you and Thomas go with Mr. Lincoln to the Parker House on that occasion?

(Same objection.)

Ans. Went up there to have a conversation in relation to a pencil-case which Mr. Thomas pretended to know something about. He went there with the intention of getting certain sums of money from these parties for certain evidence.

Int. 13. Conversation with whom?

(Same objection.)

Ans. Mr. Illfelder and Mr. Lincoln.

Int. 14. How long was that interview at the Parker House?

(Same objection.)

Ans. Well, I couldn't say definitely. We staid a short time there—smoked a cigar.

Int. 15. What was said, if anything, in relation to said Thomas getting certain sums of money, as you have stated, or the substance of what was said?

(Same objection.)

Ans. Thomas wished me to state to them that he could furnish very material evidence for them—Mr. Illfelder—and that was so stated—which evidence would be given upon a consideration—to break down Mr. Dunton's testimony, if he was able to do this.

Int. 16. When you came away from that interview, did any one come away with you; and, if so, who?

(Same objection.)

Ans. Thomas came away with me. I don't remember whether Lincoln came away prior or at that time. My impression is that Mr. Lincoln went away firstly.

850 Int. 17. Was Mr. Lincoln present during that conversation you have mentioned in regard to said Thomas getting certain sums of money from said Illfelder?

(Same objection.)

Ans. Mr. Lincoln was there during the conversation, or part of it.

Int. 18. When and where did you next see said Illfelder?

(Same objection.)

Ans. Saw him at my office on Hanover street, No. 219. It was the next day after this interview.

Int. 19. Who, if any one, was with him, and what occurred?

(Same objection.)

Ans. There was a lawyer came in with him from New York. I don't know if it was Mr. Wetmore, or who it was. They were looking for Mr. Thomas; that's all.

Int. 20. When and where did you next see said Illfelder?

(Same objection.)

Ans. Saw him Monday, at my office.

Int. 21. Who, if any one, was there with him, and what occurred?

(Same objection.)

Ans. Mr. Arthur Lincoln was with him. They were looking for Mr. Thomas, and requested me to go and find him for them; but I didn't think I could do so. I finally went over and saw Mr. Thomas with Mr. Brandt.

Int. 22. When and where did you next see said Illfelder?

(Same objection.)

Ans. I saw him coming down Hanover street the next day with Mr. Lincoln.

851 Int. 23. What time in the day?

(Same objection.)

Ans. It was in the morning.

Int. 24. Where were you?

(Same objection.)

Ans. I was in my office, up one flight, in the front of the building. I was at the window.

Int. 25. Were you or not expecting to see them at that time; and, if so, why?

(Same objection.)

Ans. I was. They made an appointment to meet Mr. Thomas there at that time.

Int. 26. Was any one in your office at that time with you; and, if so, who?

(Same objection.)

Ans. Mr. Thomas, Mr. Brandt, and there were two or three women in there.

Int. 27. Did Mr. Brandt come in before you saw, from your window, Illfelder and Lincoln on the street, or subsequently?

(Same objection.)

Ans. He came in before.

Int. 28. Did Lincoln and Illfelder come into your office?

(Same objection.)

Ans. Lincoln came in and Illfelder did not.

Int. 29. What occurred?

(Same objection.)

852 Ans. Mr. Lincoln wanted to make arrangements in regard to getting a statement from Mr. Thomas in relation to the pencil matter. Then I called Mr. Thomas from the other room and let him do his own business; he was there; and Mr. Thomas and Mr. Lincoln came to an understanding; he was to give him a statement for so much money, and they went out together to get note-paper. They were

gone a short time, returned together, and Mr. Brandt came in directly after them.

Int. 30. When they came back, what, if anything, was done in your room?

(Same objection.)

Ans. They made arrangements, and he gave a statement, and the money was paid for it.

Int. 31. Was that statement in writing?

(Same objection.)

Ans. It was.

Int. 32. Did Thomas sign it; and, if so, did you see him sign it?

(Same objection.)

Ans. He did; I saw him.

Int. 33. What day of the month was that?

(Same objection.)

Ans. I think that was Tuesday, about the 14th or 15th of April; I am not sure—April last.

Int. 34. Prior to the interview with Lincoln and Illfelder at the Parker House, which you have first mentioned, do you know whether or not Thomas had already had one or more interviews on this subject with Illfelder?

(Same objection.)

Ans. Thomas told me he had.

(Answer objected to as hearsay.)

853 Int. 35. Were you present at any time previously when said Thomas met said Illfelder; if so, how long previously, and where?

(Same objection.)

Ans. I was not present at any other time when he met him, to my recollection. I was present when he met other parties, but not him.

Int. 36. When you first became acquainted with Silas C. Thomas, did he make any statement or representation to you about his business; if so, what did he say?

(Same objection. Objected to as hearsay.)

Ans. Said that he had been to work on certain pencil-cases for certain parties, and they hadn't paid him; said he'd got a big thing; that he was going to make about five hundred dollars out of one side, and he'd testified for the other already; he said A. R. Dunton had used him meanly and kicked him down stairs, and he'd make him sick.

Int. 37. I refer to his introduction to you on the 17th of March, whether or not he stated his business to you then, and what he said.

(Same objection.)

Ans. He said he had been a physician, and practiced medicine in the State of Maine, and in the United States Army, and that he was now in at Weeks & Potter's. I gave him one of my cards, and he called to see me subsequently.

Int. 38. Had you any other knowledge at the times you have mentioned of his business and antecedents, except what *so* you derived from him himself?

(Same objection.)

Ans. I have not, excepting Mr. Brandt might have said to me that he had some trouble at Weeks & Potter's. When I went over to
854 East Boston that day he had some trouble; his brother lost his pocket-book, and he said he had it; he also had stated to me that he had moved, and I found that he had not; his stories were not very accurate; I put no confidence in them; he would tell a fresh one every day. Thomas told me privately that he had his brother's pocket-book.

(Answer objected to as hearsay.)

Cross-interrogatories proposed de bene esse by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Did you know the substance of the statement that Thomas signed in your office?

Ans. I did. I heard it read after it was put down.

Cr.-int 2. Had you previously heard Thomas make the same statements in conversation?

Ans. I had—similar statements.

Cr.-int. 3. How long before, if you remember?

Ans. He had talked to me about the business most every time I saw him.

(Last two interrogatories and answers objected to by defendant as new matter and hearsay.)

Cr.-int. 4. Did I correctly understand that the first time you saw him was March 17th?

Ans. It was some public day; there was a very large crowd on the street. I was only acquainted with him a short time previously to this affair.

Cr.-int. 5. You fix March 17 because you think it was, probably, St. Patrick's day?

Ans. Yes.

Cr.-int. 6. Was he then employed at Weeks & Potter's?

Ans. He had been. I think he was out of work at that time, he said.

Cr.-int. 7. And you saw him, as I understand, from time to time after your first interview, which you think was St. Patrick's day, up to
855 the time in the month of April when you saw him on the occasion referred to in your direct examination?

Ans. I did not see him again for two or three weeks after I met him the first time.

Cr.-int. 8. Do you know Mr. A. R. Dunton?

Ans. I do.

Cr.-int. 9. How long have you known him?

Ans. I should have to figure that up; about nineteen years.

Cr.-int. 10. Do you know Mrs. Pendleton and Mrs. Sprague, who were connected with Mr. Dunton?

Ans. I do not know them personally. I am not acquainted with them.

Cr.-int. 11. Where is your present place of business?

Ans. No. 94 Tremont street, opposite Tremont House.

Cr.-int. 12. Did you move there directly from Hanover street?

Ans. I did not. From Hanover I went to 31 Winter street, on account of a little difference in relation to rent. I went from there to Temple place, and I moved from Temple place to 34 Tremont, it being a better location; they raised the rent at 31 Winter street.

Cr.-int. 13. Did Mr. Dunton call upon you, either at Winter street or Temple place?

Ans. He did.

Cr.-int. 14. Did he speak about this case?

Ans. Yes; he has spoken about the case.

Cr.-int. 15. Do you know Mr. James Sumner, of Milton?

Ans. I do.

Cr.-int. 16. How long have you known him?

Ans. I have known him two or three years.

Cr.-int. 17. Did he call upon you with Mr. Dunton, at any time, in relation to this case?

Ans. No; he has been in there at the same time Mr. Dunton has been

in there, and they may have been in both together. I did some work for Mr. Dunton. I do dentistry.

Cr.-int. 18. Who first asked you to come and testify to-day?

856 Ans. Mr. Thacher—Peter Thacher.

Cr.-int. 19. Had you previously made any affidavit or statement of the matters to which you have testified to-day? And, if so, please state when first.

Ans. I don't know the date. I made a statement here—no affidavit—in April, I think.

Additional direct interrogatories by Mr. Washburn, and answers of witness thereto:

Int. 39. What did you do for Mr. Dunton?

Ans. I made a set of teeth for him.

Int. 40. Did you come here to-day to testify in obedience to a subpœna served upon you?

Ans. I did so.

B. E. DONHAM, M. D.

Sworn and subscribed before me.

F. DODGE,
Examiner.

BOSTON, *Nov. 19th*, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of JOHN H. BRANDT, taken on behalf of the defendant, at Boston, Mass., November 19, 1873, before Frederic Dodge, special examiner.

Direct interrogatories by John S. Washburn, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. John H. Brandt; Melrose; druggist.

857 Int. 2. Are you acquainted with Silas C. Thomas, of East Boston; if so, how long have you known him, and where did you become acquainted with him?

Ans. I've known him since last December; he was employed at Weeks & Potter's, and I was employed by Cutler Bros.; they were both druggists, both firms.

Int. 3. Do you know Joseph Illfelder, now present; and if so, how long have you known him?

Ans. Ever since the 14th of April, I believe; I know his appearance—April last, I mean.

Int. 4. Where, and in company with whom, if any one, did you see him on the 13th of April last?

(Objected to as incompetent, irrelevant, and immaterial.)

Ans. I saw him in Dr. Donham's office at 219 Hanover street, in company with Mr. Lincoln, Mr. Arthur Lincoln of Pemberton square.

Int. What occurred?

(Same objection.)

Ans. Mr. Lincoln went in and asked for Mr. Thomas, if he had been

there, and Dr. Donham said no, he hadn't been there. Mr. Lincoln said that was rather curious, as he had an appointment there, and that if he came there he would be kind enough to detain him until he came back.

Int. 6. Was said Illfelder present when Mr. Lincoln said this?

(Same objection.)

Ans. Yes, sir.

Int. 7. Did you or not, at any time subsequently, see said Illfelder, Lincoln, and Silas C. Thomas together; and, if so, when and where?

(Same objection.)

858 Ans. I did; on the 15th of April last, the next day, in the neighborhood of Dr. Donham's office, in Hanover street.

Int. 8. Did you hear anything, and if so what, that was said by any of them on that occasion; and, if so, by whom?

(Same objection.)

Ans. No, sir; I didn't.

Int. 9. What time of the day was it?

(Same objection.)

Ans. Well, it was before dinner; some time between nine and ten, I should think.

Int. 10. When you so saw said Illfelder, Lincoln, and Thomas on Hanover street on that occasion, were they walking or standing still together?

(Same objection.)

Ans. They were standing still together, and I was walking by.

Int. 11. Did they, or not, appear to be in conversation together?

(Objected to as leading. Withdrawn.)

Int. 12. What, if anything, did they appear to be doing?

(Same objection as to 4.)

Ans. They appeared to be in conversation, but I was just walking by.

Int. 13. Did you hear or see anything that occurred?

(Same objection.)

Ans. No, sir; nothing I could be certain of.

Int. 14. Did you see them, or either of them, after that, that day; and if so, how long after, and where?

(Same objection. Objected to as leading.)

859 Ans. About ten minutes afterwards I saw Mr. Lincoln and Thomas up in Dr. Donham's office.

Int. 15. What, if anything, occurred there then?

(Same objection.)

Ans. Mr. Lincoln was writing down a statement for Mr. Thomas.

Int. 16. Did you see that statement signed by anybody; and, if so, by whom?

(Same objection.)

Ans. I saw it signed by Mr. Thomas.

Int. 17. What, if you know, was that statement about?

(Same objection.)

Ans. It was in reference to the pencil case, I believe.

Int. 18. Was anything said or done about money in connection with that statement; and, if so, what?

(Same objection, and as leading.)

Ans. After Thomas signed the statement, Mr. Lincoln gave him some money, and Thomas didn't seem to be satisfied with it; but Mr. Lincoln said that if Mr. Wetmore, to whom he should send that statement, thought that it was of any use, he would pay him handsomely.

(Answer objected to as hearsay.)

Int. 19. Do you know what the amount of money was which Mr. Lincoln then gave Thomas?

(Same objection as to 4th.)

Ans. I was told it was twenty-five dollars.

(Answer objected to as hearsay.)

Int. 20. Who told you?

(Same objection.)

860 Ans. Thomas told me and he showed me. I saw a $20 bill myself.

Int. 21. Have you any knowledge of what money Thomas previously had, if any; and, if so, what?

(Same objection.)

Ans. Only from what Thomas said himself. I believe he said he had about $25 or $40. He said he had some, but I don't know how much.

Int. 22. Do you mean that Thomas had that amount of money besides the $25?

(Same objection, and as hearsay and leading.)

Ans. That's what Thomas said himself.

Int. 23. Was any other or larger sum than $25 spoken of to be paid to Thomas for that statement?

(Same objection as to last.)

Ans. I didn't hear any fixed sum. Mr. Lincoln said he should be paid handsomely if the statement was important.

Int. 24. What, if anything, did Thomas say about it?

(Same objection as to last.)

Ans. Thomas said that he could make a thousand dollars out of it.

Int. 25. Did he make any statement to you at that time touching the sum Illfelder had agreed to give him for making that statement; and, if so, what was it?

(Same objection as to last.)

Ans. Well, he told me that Mr. Illfelder told Mr. Lincoln to give him, if he wanted, fifty dollars; that's what he told me.

Int. 26. Were you present, or was anything said about your having been present, when that occurred?

(Same objection as to last.)

861 Ans. Thomas asked me if I didn't hear him say it when I passed by.

Int. 27. Did you so hear it or any of it?

(Same objection as to last, and also because the witness has already stated that he heard nothing when he passed by of which he could be certain.)

Ans. Nothing that I could be certain of.

Cross-interrogatories proposed de bene esse by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Was Mr. Lincoln writing out the statement when you went into the office?

Ans. Yes; just sitting down then.

Cr.-int. 2. Who else was present at that time?

Ans. Well, Dr. Donham; he was partly in the room and partly in the inside room, with somebody that I don't know who it was.

Cr.-int. 3. Did you hear the statement read?

Ans. No, sir; I didn't.

Cr.-int. 4. Did you stay in the room until Mr. Lincoln left?

Ans. Yes, sir.

Cr.-int. 5. Were you present all the time after you came in until he left?

Ans. Yes, sir.

Cr.-int. 6. Did he take the statement away with him?

Ans. Yes, sir.

Cr.-int. 7. Where was your place of business at that time?

Ans. I was doing nothing at that time.

Cr.-int. 8. Where had you come from and where were you going when you say you saw Thomas and Mr. Illfelder and Mr. Lincoln in the street?

Ans. I came up Court street and went down Hanover street.

Cr.-int. 9. From what place in Court street had you come, and to what place in Hanover street were you going?

862 Ans. I did not come from any certain place. I was walking around, and walked down Hanover street.

Cr.-int. 10. Had you been in Dr. Donham's office before, that morning?

Ans. No, sir; not that morning.

Cr.-int. 11. Had you been with Dr. Dohham the preceding day?

Ans. Yes, sir.

Cr.-int. 12. Did you go over to East Boston with him to find Thomas?

Ans. Yes, sir.

Cr.-int. 13. Have you previously made a statement, in writing, of the matters to which you have testified here to-day?

Ans. Yes, sir.

Cr.-int. 14. Was that at the same time that Dr. Donham made a similar statement?

Ans. I did not see him at that time.

Cr.-int. 15. You made that statement to Mr. Thacher?

Ans. Yes, sir.

Cr.-int. 16. Did you make it a short time after these occurrences to which you have referred took place last April?

Ans. Yes, sir.

Cr.-int. 17. Who asked you to come and make it?

Ans. I was in there, and I believe Mr. Thacher asked me to come and state to him what I knew about it; and I did.

Cr.-int. 18. In where?

Ans. In here—this room—Mr. Thacher's office.

Cr.-int. 19. Who asked you to come here?

Ans. The first one that asked me to come, I believe, was Mr. Dunton.

Cr.-int. 20. Mr. A. R. Dunton, here present?

Ans. Yes, sir.

Cr.-int. 21. How long have you known Mr. Dunton?

Ans. Since the 10th of April, I think it was.

Cr.-int. 22. Where did you see him then?

Ans. Up in his office.

Cr.-int. 23. Was Dr. Donham there?

863 Ans. He took me up there, to Mr. Dunton's office.

Cr.-int. 24. Was this pencil case mentioned while you were there on that occasion?

Ans. I believe it was. I'm not certain about that date—the 10th—I may be wrong. It wasn't many days before the 15th, any way.

Cr.-int. 25. Had you ever heard Thomas talk about the pencil case before he made that statement to Mr. Lincoln?

(Objected to as new matter, and not within the order.)

Ans. Yes, sir.

Cr.-int. 26. Was anything said about Thomas, when you and Donham were at A. R. Dunton's, a few days prior to the 15th?

(Same objection.)

Ans. Yes.

Cr.-int. 27. What was said?

(Same objection.)

Ans. Thomas wanted Mr. Donham to go to A. R. Dunton and make some value with him; see how much he could get, if he could testify in the case.

Cr.-int. 28. You knew, did you not, that Mr. Illfelder or Mr. Lincoln, or both of them, were expected to call at Mr. Donham's office on the 15th to see Thomas?

(Same objection.)

Ans. I did. Yes, sir.

Cr.-int. 29. And when you were walking from nowhere in particular on Court street, to nowhere in particular on Hanover street, you were waiting to see them, were you not, when they should come along?

Ans. No, sir, I was not.

Cr.-int. 30. Do you know whether Mr. A. R. Dunton knew that Mr. Lincoln or Mr. Illfelder, or both of them, were going to meet Dr.
864 Thomas on that morning, or whether any one told Mr. Dunton of that fact before they arrived?

Ans. No, sir; not as I remember now.

Cr.-int. 31. With whom are you engaged in business at present, and where?

Ans. I am at Mr. Denny's, in Melrose, at present.

Cr.-int. 32. Have you ever received any compensation for your services in this matter prior to your being summoned as a witness here to-day?

Ans. No, sir.

Cr.-int. 33. Ever promised any?

Ans. No, sir.

Cr.-int. 34. How long did you remain at Dr. Donham's office after Mr. Lincoln left with the statement?

Ans. Only a few minutes.

Cr.-int. 35. Where did you next go?

Ans. I went with Thomas and Donham into a saloon in Hanover street.

Cr.-int. 36. Where did you go when you left the saloon?

Ans. I went home to 57 N. Russell street.

Cr.-int. 37. Where did Donham go, if you know?

Ans. I left him in Townsend's saloon.

Cr.-int. 38. Did you leave him with Thomas?

Ans. Yes, sir.

Cr.-int. 39. Did you know that Thomas, that morning, was at Donham's office, waiting for Mr. Lincoln and Mr. Illfelder to arrive?

Ans. No, sir.

Cr.-int. 40. Didn't you see Mr. Illfelder and Mr. Lincoln walking alone toward Dr. Donham's office that morning?

Ans. No, sir; I didn't.

JOHN H. BRANDT.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, *November* 19*th*, 1873.

865 Defendant's Exhibit YY, previously identified, is here offered by him in evidence.

F. DODGE,
Examiner.

BOSTON, *Nov.* 19*th*, 1873.

Circuit court of the U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of STEPHEN THACHER, taken on behalf of the defendant, at Boston, Mass., November 19th, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., on behalf of the defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business.

Ans. Stephen Thacher; age 25; Boston, Mass.; junior partner in the firm of Peter and Stephen Thacher, counselors at law.

Int. 2. State whether you were at Camden, Me., and vicinity in the latter part of July and first of August last; and, if so, what was your business there.

Ans. I was; I was looking up testimony in behalf of the defendant in this suit.

Int. 3. State whether on the afternoon of July 3d, last, you had an interview with Mrs. Rachel B. Thomas; and, if so, what took place, and where it was, and who, if anybody, was present.

866 Ans. I did, at her house in Camden; Mr. A. R. Dunton was present. I had some conversation with her, and inquired about the day in February last when Mr. Dunton was at her house, and on which she gave him Exhibit E. She told me she could not say it was not Saturday—that she never should deny that she gave it to him on Saturday.

Int. 4. State whether she made any allusion to a written statement she had made touching the time s he found and gave Mr. Dunton Exhibit E; and, if so, what she said.

Ans. She said that the statement which Mr. Dunton wrote and she signed, and which Mr. Dunton carried to Mr. Thacher, senior, at Camden, must remain undisputed.

Int. 5. State whether you committed such statements of hers to writing and requested her to sign the same.

Ans. I did not; neither committed them to writing nor asked her to sign them.

Cross-interrogatories by E. Wetmore, esq., for complainant, and answers of witness thereto:

Cr.-int. 1. Did you prepare, or was any statement at all prepared, to your knowledge, in this suit, for Mrs. Thomas subsequent to her first examination in this case?

Ans. I prepared one.

Cr.-int. 2. Was that in your possession or in Mr. Dunton's possession on the occasion of your call upon her that you have already mentioned?

Ans. No, sir.

Cr.-int. 3. Was it prepared before or after that interview?

Ans. Before.

Cr.-int. 4. Was any reference to that statement made at the interview to which you have testified?

Ans. Yes, sir.

Cr.-int. 5. What was said in regard to it?

Ans. She said she would like to have me destroy it.

Cr.-int. 6. Did that statement relate to the day when Exhibit E was found?

867 Ans. In part.

Cr.-int. 7. How long before your interview had it been prepared?

Ans. On the morning of the same day—July 31st.

Cr.-int. 8. Did Mrs. Thomas state, during the interview to which you have referred, that she would swear that she found Exhibit E on Saturday?

Ans. She did not; but she said, if called to testify by the other side, that she should swear that she could not remember when she found it.

STEPHEN THACHER.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *November 19th*, 1873.

Circuit court of U. S., southern district of N. Y.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The deposition of ALVIN R. DUNTON, taken on behalf of the defendant, at Boston, Mass., Nov. 19, 1873, before F. Dodge, special examiner.

Direct interrogatories by P. Thacher, esq., for defendant, and answers of witness thereto:

Int. 1. Please state your name, residence, and business?

Ans. Alvin R. Dunton; Boston, Mass.; teacher of penmanship and drawing, and author.

868 Int. 2. You are the same A. R. Dunton, are you not, who has already testified in this case?

Ans. I am.

Int. 3. Please look at the paper which I now hand you, and state whether you saw it signed, and by whom, and under what circumstances, and when, and what transpired?

(Said paper identified and marked by magistrate "Defendant's Exhibit ZZ.")

(Objected to on the ground that the said writing was not exhibited to Mrs. Thomas upon her last examination.)

Ans. I did see it signed by Mrs. Rachel B. Thomas. After Mrs. Barbour testified Mr. Thacher told me what she had testified to, and I called to see her. I stated that Mrs. Barbour had made a mistake in her testimony, and I wished her to correct it to Mr. Thacher. She said at first she would; then she said that she wouldn't, but she would to Mr. Illfelder or his lawyer. I don't know whether she mentioned Mr. Wetmore or Blake. I said to her: Mrs. Thomas, you gave me the pencil on Saturday when I came, and she said "yes." I took that card and wrote what she said in regard to it, and she signed it. (Exhibit ZZ is the card referred to.) I carried it direct to Mr. Thacher, and gave him the information in regard to Sarah's contradicting what she'd sworn to—Mrs. Barbour, I mean. I went back to the house a short time after, and inquired if the statement had been contradicted, and she said "no; it hadn't. Mrs. Thomas said, "I think that I gave you that pencil on

Monday," when I came back that same evening. When she first spoke to me, for the moment, I said "perhaps it was," but immediately said it couldn't be so, for I'd shown it to a number on Sunday. That ended the conversation about the pencil that evening.

Int. 4. Did you, after you received said writing on said card, the next time you called on Mrs. Thomas, or at any time, say to her: "You and Sarah were right, it was Monday night that you found and gave me the pencil-eraser," or did you use to her, at any time, any language of like signification?

869 Ans. I have no recollection of any such language; I don't see why I should, after I had thought of it and told her it was Saturday night that she found it and gave me, that I'd shown the pencil to different parties on Sunday.

Int. 5. Did you the next time you called on her after receiving said writing, or at any time say to her, or in her presence, that you would go to Mr. Thacher and change or correct said writing, so that it should read that it was Monday instead of Saturday evening that she gave you the pencil; or did you at any time use language to her, or in her presence, of like signification?

Ans. I did not; but she seemed to be anxious, when I called, that I should; she said Sarah had testified that she spoke to her about the pencil on Monday, and she wanted me to speak to Mr. Thacher contradicting it. I told her that that couldn't be done; that what she stated to me in regard to giving me the pencil on Saturday was true, and it couldn't be altered. She subsequently told me that she couldn't really tell; that she was so mixed up about it that she couldn't tell whether it was on Saturday or Monday.

Int. 6. Do you recollect of being present, one day last summer, at a conversation in Mrs. Thomas' house, in Camden, between her and Mr. Stephen Thacher?

Ans. I do.

Int. 7. Have you heard the testimony of said Thacher this afternoon?

Ans. I have.

Int. 8. State how your recollection of Mrs. Thomas' statements to him accord with what he has testified she said in regard to her finding the pencil, and in regard to the said writing she so gave to you.

(Counsel reads from record the statement of Mr. Stephen Thacher above alluded to.)

Ans. According to the best of my recollection, the statement is true in regard to what she said.

Int. 9. State whether, in any conversation with you, Mrs.

870 Thomas, at any time, gave you any reason for her varying from the written statement aforesaid, and, if so, what it was.

(Objected to as leading. Question withdrawn.)

Int. 10. State whether, at any time this summer or fall, Mrs. Thomas has said anything as an explanation of her varying, at any time, from her said written statement, and, if so, what did she say?

(Same objection, and that no foundation has been laid for the question in cross-examination.)

Ans. I asked her what her idea was in changing so often. When she would see me she would be one way, and the next time she would be the other way. She said that Sarah, her daughter, Mrs. Barbour, wouldn't let her testify that way, or state that it was on Saturday. She also said, "What do you care about the case? Let Mr. Illfelder have it." I said that I cared nothing about it any further than my testimony, which I'd sworn to, and which was true.

Cross-interrogatories by Mr. Wetmore, for complainant, and answers of witness thereto:

Cr.-int. 1. Where did you first see a copy of Mrs. Barbour's testimony after she had testified?

Ans. I saw it after it was in print the first time; I think it was in Boston; am not positive; am quite sure it was.

Cr.-int. 2. When were you first told what her testimony was?

Ans. Mr. Thacher mentioned a few things to me, a few sentences, the same afternoon she testified. I had quite a curiosity to know what she could say after she had told me she knew nothing about the case any way.

(Last clause objected to as irresponsive.)

Cr.-int. 3. When were you first told that she had said anything in her testimony in regard to the day when she first heard of Exhibit E?

871 Ans. I think it was the same afternoon.

Cr.-int. 4. Were you at Mrs. Thomas' house that evening?

Ans. I was, twice.

Cr.-int. 5. Please state the conversation that took place when you and Mr. Stephen Thacher called on Mrs. Thomas in the summer, to which you have already referred.

Ans. Mr. Thacher and she had quite a conversation in regard to the time. She stated that she gave me the pencil on Saturday, and that the paper that she gave me on the evening of the day that her daughter testified—Mrs. Barbour—must stand as it was, and that if she was called upon to testify on the other side, that she didn't know whether it was certainly on Saturday or on Monday; but she had come to the conclusion that it was on Saturday. That she was a good deal mixed about it, there had been so much talk, and could hardly tell herself when it was; but she had come to the conclusion that it was on Saturday.

Cr.-int. 6. Was that all that was said on that occasion?

Ans. That's all that I recollect. The conversation turned upon something else—on matters and things in general.

Cr.-int. 7. How long were you at Mrs. Thomas' house when she signed that card, Exhibit ZZ?

Ans. It might have been five minutes, probably not more than two; I went right in and came out again; I was somewhat excited; probably not over two the first time.

Cr.-int. 8. Were you ever told that you were entitled to a patent for the rubber-inserted pencil, as the inventor thereof?

(Objected to as new matter, in no respect within the order.)

Ans. I presumed that I got them up as soon as anybody, and that
872 if I'd applied for a patent it would be a good thing for me, but I had sense enough to know that I wasn't entitled to it, and I never made any statement to that effect.

Additional direct interrogatories by P. Thacher, esq., and answers of witness thereto:

Int. 11. What do you mean, Mr. Dunton, by saying that you were not entitled to it?

Ans. I knew that if a man made things and circulated them about broadcast, using them and letting others use them for a long period of time without getting his patent or applying for it, and others getting hold of them and securing a patent, that my right was forfeited; so I'd understood from information I'd got about patents; so it was in

case of my writing-books; I circulated them about broadcast before I applied for a copyright.

A. R. DUNTON.

Subscribed and sworn to before me.

F. DODGE,
Examiner.

BOSTON, MASS., *Nov. 19th*, 1873.

873 *Defendant's Exhibit A.*

The U. S. Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the files of this office, of the file-wrapper and contents in the matter of the application for letters-patent, granted Hymen L. Lipman, dated March 30th, 1858, No. 19,783, for "Lead-pencil and Eraser."

In testimony whereof I, Samuel A. Duncan, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed this tenth day of February, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.]

SAML. A. DUNCAN,
Acting Commissioner.

$30. gld. 2 drs. & model. Hand.

PHILADELPHIA, *January* 9, 1857.

TO THE COMMISSIONER OF PATENTS,
Washington, D. C.:

The petition of Hymen L. Lipman, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, respectfully represents, that your petitioner has invented a new and improved lead-pencil and eraser, which he verily believes has not been known or used prior to the invention thereof by your petitioner.

He therefore prays that the letters-patent of the United States may be granted to him therefor, vesting in him and his legal representatives the exclusive right to the same, upon the terms and conditions expressed in the act of Congress, in that case made and provided, he having paid thirty dollars into the Treasury, and complied with the other provisions of the same act.

HYMEN L. LIPMAN.

The $30 will be paid herewith.

(Endorsed:) Specification.

874 To all whom it may concern:

Be it known that I, Hymen L. Lipman, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented a new and useful lead-pencil and eraser, and I do hereby declare the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing, and to the letters of reference marked thereon.

I make a lead-pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, A, and insert in this groove a piece of prepared India rubber, (or other erasive substance,) secured to said pencil by being glued to one edge; the pencil is

then finished in the usual manner, so that on cutting one end thereof, you have the lead, B, and on cutting at the other end you expose a small piece of India rubber, C, ready for use, and particularly valuable for removing or erasing lines, figures, &c., and not subject to be soiled or mislaid on the table or desk.

Erase and Insert. A. What I claim as my invention, and desire to secure by letters-patent, is the combination in one pencil of both lead and India rubber, (or other erasive substance,) laying no claim to either substance when separately used.

Dated Philadelphia, January 9, 1857.

HYMEN L. LIPMAN.

Witness:
LEWIS A. LIPMAN.
JOHN R. CHARLTON.

CITY AND COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

On this ninth day of January, one thousand eight hundred and fifty-seven, before the subscriber, an alderman and justice of the city of Philadelphia, personally appeared the within-named Hymen L. Lipman, and made solemn oath that he verily believes himself to be the original and first inventor of the pencil and eraser herein described, and that he does not know or believe the same was ever before known or used; and that he is a citizen of the United States.

875

HYMEN L. LIPMAN.

Sworn and subscribed to on January 9, A. D. 1857, before me.
CHARLES D. FREEMAN,
Alderman and Justice of the Peace.

(Endorsed:) Rec'd and filed January 10, '57.—L. F. W.

15 m.] U. S. PAT. OFFICE, *Jan.* 15, '57.

SIR: Your appl'n for a "lead-pencil and eraser" has been duly ex'd and rejected. In the appl'n of Joshua Gray for a "lead-pencil," rejected Sep. 23, 1856, you will find substantially the same device. It has long been a common practice with draughtsmen to insert into one end of their pencils a piece of rubber with the same purpose you have in view.

Resp'y,

/3/

HYMEN L. LIPMAM, Esq.,
Phil., Penn.

See D. T. Pond's crayon rubber, pat. Sep. 21, '52.

(Endorsed:) Official, 15 Jan., '57.

I hereby appoint Wm. Read and John R. Barker to be my attorneys in prosecuting my application for patent for "artists' pencil and eraser," before the Patent-Office; to receive the letters-patent when granted, to receipt for any moneys that may be returnable to me, and in general to do all that I would be entitled to do if personally present and acting in the premises.

876

Dated at Philadelphia, this 5th of March, A. D. 1858.

HYMEN L. LIPMAN. [SEAL.]

Witness:
HENRY C. BEYER.

(Endorsed:) Power of attorney from Hymen L. Lipman to Wm. Read and John R. Barker. Filed March 6, '58.

PHILA., *March* 12, 1858.

Messrs. WM. READ and JOHN R. BARKER, *Washington:*

GENTLEMEN: Your favor of the 11th is rec'd, and I enclose herewith the oath you require.

Resp'y, yours,

HYMEN L. LIPMAN.

CITY AND COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

On the twelfth day of March, one thousand eight hundred and fifty-eight, before the subscriber, an alderman and justice of the city of Philadelphia, personally appeared the within-named Hymen L. Lipman, and made solemn oath that he verily believes himself to be the original and first inventor of the pencil-eraser herein described, and that he does not know or believe the same was ever before known or used; and that he is a citizen of the United States.

HYMEN L. LIPMAN.

Sworn and subscribed to on March 12th, A. D. 1858, before me.

CHARLES D. FREEMAN,
Alderman and Justice of the Peace.

877 WASHINGTON, D. C., *March* 13, 1858.

Insert.

SIR: I hereby amend the specification of my application for letters-patent for a combined lead-pencil and eraser, by erasing the present claim, and substituting in lieu thereof the following:

In making mathematical, architectural, and many other kinds of drawings, in which the lines are very near each other, the eraser is particularly useful, as it may be sharpened to a point to erase any mark between the lines; and should the point of the rubber become soiled or inoperative from any cause, such cause is easily removed by a renewed sharpening, as in the ordinary lead-pencil. I do not claim the use of a lead-pencil with a piece of India rubber, or other erasive material, attached at one end, for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by letters-patent, is, the combination of the lead and India rubber, or other erasing substance, in the holder of a drawing-pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth.

HYMAN L. LIPMAN,
By WM. READ & JNO. R. BARKER,
Attorneys.

Hon. JOS. HOLT,
Commissioner of Patents.

(Endorsed:) Read & Barker, Mar. 13 / 58. Amendment A, rec'd & filed March 13.—T. R. P., 15.

878 22
15

No. 10,783.

HYMAN L. LIPMAN,

Of Philadelphia,
County of "
State of Pennsylvania.

Oath renewed.

Lead-pencil and eraser.

Rec'd January 10, 1857.
Petition, " " "
Affidavit, " " "
Specification, " " "
2 Drawings " " "
Model, " " "
Cert. dep.,

1 Cash, $30, January 10, 1857.
Examined, March 15 / 58.—T. R. PEALE.
2 Issue Shugert, March 18, 1858.
4 Patented March 30, 1858.
Recorded vol. 85, page 471.
P. WM. READ and J. R. BARKER.
Arts.

Pen and pencil.

Rej'd. Jan. 15 / 57.
Spec. & 1 Dr. to mo., Mar. 11 / 58.

READ & BARKER.

Intf. decl'd with Josh. Gray and others, July 27, 1870.
Day of hearing, 4th Friday, September, 1870.
Endorsed: Combination of lead-pencil and eraser.

879 *Defendant's Exhibit Q.*

The U. States Patent-Office, to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this Office of the specification and drawing in the matter of the letters-patent granted Daniel F. Pond, dated September 21st, 1862, No. 9,277.

In testimony whereof, I, Samuel S. Fisher, Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed this fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fourth.

[SEAL.] SAML. S. FISHER,
Commissioner.

Daniel F. Pond, of New Haven, Conn. Letters-patent, No. 9,277. Dated Septr. 21, 1852.

To all whom it may concern:

Be it known that I, Daniel F. Pond, of New Haven, in the county of New Haven and State of Connecticut, have invented a new and useful article, called "Pond's Two-Crayon Rubbers;" and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings, and to the letters of reference thereon marked.

The nature of my invention consists in producing a substance to be

used in rubbing in prepared chalk, and blending the crayons in the style of drawing of which I am the inventor, and which is denominated the "Two-Crayon or Improved Monochromatic Drawing." The
880 great superiority of this style over common pencil-drawing consists in the very great rapidity of execution and the utmost delicacy of shading attainable therein. But in order to the attainment of these advantages, it is necessary that something else be made use of in the application of colors than the mere crayons themselves; and, as the colors are to be applied to paper, or other material having an evenly granulated surface of prepared marble or other hard substance, it is necessary that the rubber used should possess the following properties:

1st. It should be sufficiently pliant and elastic to press the prepared chalk and the crayons between the particles composing the granulated surface.

2d. The rubbing surface should be perfectly smooth, so that the chalk and colors may be evenly applied and the shading delicately graduated.

3d. The edges and corners next the rubbing surface of the rectangular rubbers should be perfectly smooth and slightly rounded—smooth for the reason already given, and slightly rounded because, in the first place, if perfectly sharp, it would very soon, by use, have a rough and jagged edge, rendering the whole instrument unfit for use. In the second place, a sharp edge would, to a greater or less extent, displace the crayon with which it came in contact; and, in the third place, if the edge or corner were sharp, portions of it, on the side towards which the rubber happened to be moving, coming in contact with the protuberant particles, would be constantly turning under, thus alternately elevating and depressing one side or the other of the rubber, and wholly destroying its utility.

4thly. That rubber, while being elastic to a certain degree, should also be of so compact and tenacious a substance, that it will not readily rough up in the process to which it is applied, and

5thly. It should not be liable to any changes by cold or heat.

881 Previous to the invention for which I now ask a patent, buckskin and cork were used in various ways for rubbing in colors, but these lack many of the essential requisites enumerated above.

The native India rubber has been sometimes used, but it is almost if not quite impossible, even by cutting and grinding, to produce a sufficiently smooth surface and the requisite forms at the corners and edges, and the native gum is furthermore objectionable, in that it very soon wears rough, particularly at the corners and edges, and in cold weather it becomes too rigid for use. Previous to my invention the ball of the thumb or finger was found to answer the purpose of a rubber better than any other known substance; but the impossibility of using the thumb or finger any length of time for this purpose, by reason of the tenderness and soreness thereby occasioned, renders some substitute absolutely necessary.

To enable others skilled in the art to make and use my invention, I proceed to describe the mode in which it is produced.

In the first place, I procure moulds of different sizes and shapes, from ¼ of an inch in diameter, or less, upwards, and either rectangular, oval, conical, or cylindrical, as may be required. It is exceedingly difficult to obtain moulds by casting suitable for the purpose, on account of the air-cells that, despite all care and ingenuity, will sometimes form upon the interior surface.

I therefore make use of dies, with which I stamp thin sheets of tin,

or other metallic substance, into the required shape, and, imbedding these in solid wood or metal, use them as moulds.

I then fill these moulds with the India-rubber compound of which Goodyear's patented articles are made, and of whom I have purchased a right for this purpose; and, after the moulds are thus filled, they are subjected to a great pressure and to steam-heat, in the manner described in Goodyear's specification. These rubbers are then firmly attached to handles of metal or wood, as are shown in the accompanying drawings, and are then ready for use.

882 I do not claim as new the casting of particular forms of vulcanized rubber in moulds; but,

What I do claim as my invention, and desire to secure by letters-patent, is the crayon-rubber, made in the manner hereinbefore substantially set forth, for the purpose of applying and blending the crayon in the bichromatic and other kindred styles of drawing.

D. F. POND.

Witnesses:
W. J. BURLING.
EDWD. OLIN BURLING.

Exd. M. E. C.

Defendant's Exhibit R.

The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy, from the files of this Office, of the specification and drawing in the matter of the application of Joshua Gray, filed September 18th, 1856, for "Improvement in pencils, pencil-cases, or holders."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed, this tenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

To all persons to whom these presents shall come:

Be it known that I, Joshua Gray, of Boston, in the county of
883 Suffolk and State of Massachusetts, have invented an improvement in pencils, pencil-cases, or holders, and I do hereby declare that the same is fully described and represented in the following specification and the accompanying drawings, of which Figure 1 is a side view, and Figure 2 a longitudinal section of one of my improved pencils.

My improvement consists in combining with a pencil, or the wooden part of the lead-carrier thereof, a holder or cap, or the equivalent thereof, and a piece of India rubber or elastic erasive material, whereby the erasure or rubbing out of a pencil line or mark made with the lead of the pointed end of the pencil may be readily effaced simply by rubbing thereupon the said erasive piece of rubber.

In the drawings, A denotes a common pencil, of which *a* is the lead, and *b* the wooden holder of such lead. On one end of the pencil I affix a notched head or socket-piece, *c*, holding a convex piece of India rub-

ber, *d*, and having the same projecting from it, so that by inverting the pencil and rubbing such piece *d* on a mark made with the lead of the pointed end of the pencil, such mark may be removed from the paper or article upon which it may have been made.

The convenience of a pencil so made or so produced with an eras*ure* of rubber, or having one otherwise fixed to its upper end, so as to answer the purpose of removing marks made by the lead of the pencil, will be apparent to any person.

What I claim as my invention is combining with a pencil, by means substantially as specified, a piece of India rubber or like material, whereby marks made by the pencil may be effaced, as set forth.

In testimony whereof I have hereunto set my signature this 27th day of August, A. D. 1856.

JOSHUA GRAY.

Witnesses:
R. H. EDDY,
F. P. HALE, Jr.

884 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

On this 27th day of August, A. D. 1856, personally appeared before me the above-named Joshua Gray, and made oath that he verily believes himself to be the original and first inventor of the above or within described invention for which he solicits a patent; that he does not know or believe the same to have ever before been known or used, and that he is a citizen of the United States.

R. H. EDDY,
Justice of the Peace.

Defendant's Exhibit X.

No. 136122.

The United States of America to all to whom these presents shall come:

Whereas Phillip Hufeland, of New York, New York, has presented to the Commissioner of Patents a petition praying for the grant of letters-patent for an alleged new and useful improvement in lead-pencils, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such case made and provided; and

Whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters-patent are to grant unto the said Phillip Hufeland, his heirs and assigns, for the term of seventeen years from the eighteenth day of February, one thousand eight hundred and
885 seventy-three, the exclusive right to make, use, and vend the said invention throughout the United States and Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent-Office to be affixed, at the city of Washington, this eighteenth day of February, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh.

[SEAL.]

B. R. COWAN,
Acting Secretary of the Interior.

(Countersigned:)

M. D. LEGGETT,
Commissioner of Patents.

UNITED STATES PATENT-OFFICE.

Philip Hufeland, of New York, N. Y. Improvement in lead-pencils. Specification forming part of letters-patent No. 136122, dated February 18, 1873.

To all whom it may concern:

Be it known that I, Philip Hufeland, of the city, county, and State of New York, have invented a new and useful improvement in lead-pencils; and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification, in which drawing—

Figures 1 and 2 represent sectional side-views of this invention as applied to a lead-pencil ready for use. Fig. 3 is a side-view of the rubber holder detached.

Similar letters indicate corresponding parts.

886 This invention consists in combining with a lead-pencil a tube made of paper, cloth, or other flexible material which is soft enough to be cut with a knife, and can easily be attached to a lead-pencil, said tube containing a piece of India rubber, which it incases entirely or nearly so, in such a manner that a cheap, light, and durable rubber attachment to lead-pencils is obtained, which has the great advantage that the tube inclosing the rubber must be cut away as the rubber wears off, and said rubber can be used up entirely in the same manner as the lead, and at the same time the casing of the rubber is not liable to split as it is if the same is made of wood.

In the drawing the letter A designates an ordinary lead-pencil with a wooden case. To one end of this pencil I attach a tube, B, made of paper, cloth, leather, or other flexible material, soft enough to be cut with a knife, and capable of being readily formed in a tube of a proper diameter to fit the end of the pencil. In this tube I secure a piece of India rubber, C, and when the tube has been attached to the pencil I cut off the end of the tube, so that the rubber protrudes therefrom a sufficient distance to be used as an eraser.

As the rubber wears off the tube can be easily cut down so as to keep the end of the rubber always exposed, and thereby I am enabled to use the rubber clear down to its inner end. This property of my tube of paper, cloth, leather, or other flexible material of a similar nature is of great advantage over the metal casings generally used for rubber attachments to pencils. Futhermore, my tube is superior to a wooden casing for rubber, because it can be made very light, and yet it is not liable to split, and the material which I use in the manufacture of my tubes allows of making said tubes cylindrical or polygonal, to adapt it to the shape of the pencil.

In most cases the outside diameter of my paper tube will be made equal to the outside diameter of the pencil, and the end of the pencil will be worked down so that it can be introduced into the tube, leaving the surface of the pencil with its rubber attachment unbroken throughout.

I am aware that India rubber has been combined with a lead-
887 pencil in various different ways, such, for instance, as shown in the patent of H. Lipman, No. 19783, (1858,) where the rubber is inclosed in the wooden case of the pencil; or in the patent of Vosburgh and Ludden, No. 35355, (1862,) and re-issue No. 3683, (1869), in which a metallic clamp is shown to connect the rubber with the end of the

pencil; or in the patent of J. B. Hodgskin, No. 46358, (1865,) in which a metal tube is used which contains the rubber in one end and the other end of which can be slipped over the pencil; but I have been unable to find a tube connecting the rubber to a pencil, which is made of paper, or other flexible and tough material not liable to split, and yet capable of being cut with a knife as the rubber wears so as to expose a fresh portion of the same.

I disclaim the devices shown and described in the above-named patents of Lipman, of Vosburgh and Ludden, and of Hodgskin; neither do I claim broadly as my invention a lead-pencil and India-rubber eraser of corresponding form, which are united end to end by a paper tube; neither do I claim a lead-pencil having a paper case or tube applied to its end, so as to have its exterior surface flush with the exterior of the pencil-body, and colored or finished to correspond with the body of the pencil, as such is the subject-matter of another application; but

What I claim, and desire to secure by letters-patent, is—

A lead-pencil having attached to one of its ends a tube of paper, leather, cloth, or other tough and flexible material, forming a continuation of the pencil, and containing a piece of India rubber, which it incloses entirely, or nearly so, so that it must be cut away to expose the rubber for use, substantially in the manner herein shown and described.

This specification signed by me this 24th day of April, 1871.

PH. HUFELAND.

Witnesses:
W. HAUFF,
E. F. KASTENHUBER.

888 *Defendant's Exhibit W.*

ASSIGNMENT.

Whereas I, Phillip Hufeland, of New York, New York, have made application for letters-patent of the United States for my new and useful improvement in lead-pencils, which invention is fully described in the specification pertaining to said application, which I have signed, under oath, this 24th day of April, 1871.

Now this indenture witnesseth, that for and in consideration of the sum of one dollar, to me in hand paid, the receipt of which I acknowledge, I do hereby sell, assign, and transfer unto Eberhard Faber, of New York City, his executors, administrators, and assigns, all my right, title, and interest in and to my said improvement and the letters-patent thereof when granted, the same to be held and enjoyed by the said Eberhard Faber, his representatives and assigns, as fully and entirely as the same would have been held and enjoyed by me if this assignment and sale had not been made.

[U. S. two cents internal-revenue stamp, cancelled. U. S. two cents internal-revenue stamp, cancelled. U. S. two cents internal-revenue stamp, cancelled.]

Witness my hand and seal this twenty-fourth day of April, 1871.

PH. HUFELAND. [SEAL.]

Sealed and delivered in presence of—
W. HAUFF.

Defendant's Exhibit HH.

I, Hymen L. Lipman, of the city of Philadelphia, State of Pennsylvania, stationer and manufacturer of lead-pencils, &c., did invent and obtain letters-patent for a lead-pencil and rubber combined, bear-
889 ing date March 30, 1858, and numbered 19783, and have since manufactured and sold pencils made under said patent. Among the original experiments and samples made prior to adoption of style was one like that at the head of this sheet, having a conical top to allow for the enlarged rubber at end, made before any of my pencils under said patent were offered in the market, and of which one is still in my possession, marked A, which was made at same time as, or previous to, my application for said letters-patent.

Signed at Philadelphia, September 7, 1870.

HYMEN L. LIPMAN. [SEAL.]

Witness:

JOHN A. BERWIND.

I hereby transfer to Levi L. Tower, his heirs or assigns, all my right title, and interest in above conical-top pencil.

HYMEN L. LIPMAN. [SEAL.]

[Stamp, 5 cts.]

Witness:

JOHN A. BERWIND.

In consideration of above transfer, I hereby agree to pay said H. L. Lipman, his heirs or assigns, one-half of nett proceeds of said invention, said H. L. Lipman to be at no expense in relation thereto.

LEVI L. TOWER. [SEAL.]

Dated Philadelphia, September 7, 1870.

Witness:

JOHN A. BERWIND.

890 *Defendant's Exhibit LL.*

BOSTON, *April 24th*, 1860.

DEAR SIR: I am happy to certify that Mr. Alvin R. Dunton, a gentleman well known and highly respected in Boston, whose publications on penmanship—an art in which he is a teacher of unrivalled superiority—are used in the Boston schools, was married by me to Miss Laura L. Pendleton, October 8th, 1855.

I have the honor to be, very sincerely, yours,

A. A. MINER,

Pastor of the School St. Church, Boston.

Defendant's Exhibit MM.

The people of the State of New York, by the grace of God, free and independent, to all to whom these presents shall come or may concern, greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of Monroe, and clerk of the supreme [SEAL.] court of said State, and court of sessions for said county, do find a certain order and judgment there remaining, in the words and figures following, to wit:

891 Court of sessions of Monroe County, New York.

THE PEOPLE OF THE STATE OF NEW YORK
agt.
ALVIN R. DUNTON.

At a regular term of this court, held at the court-house, in the city of Rochester, Monroe County, New York, on the 15th day of September, A. D. 1873.

Present: Hon. George W. Rawson, special Monroe County judge, and Henry B. Hart, esquire, and Anthony H. Martin, esquire, justices of sessions.

Whereas the said Alvin R. Dunton, on the 25th day of October, 1861, at the village of Brockport, in said county of Monroe, was convicted of the alleged offence of petty larceny by Austin Harmon, esquire, then and there the police justice of said village of Brockport;

And whereas a certiorari, alleging manifold errors in said conviction and the sentence of said Dunton thereupon by the said police justice, was duly allowed, granted, and filed, and was duly served on said police justice, to which writ the said police justice has made his return to this court, as therein commanded, and did cause his original return thereto to be filed, and also a record of such conviction, in the office of the clerk of said county of Monroe, on the 8th day of November, 1861.

And these several matters now in open court, regularly coming
892 on for hearing and determination, on hearing Mr. V. M. Smith, of counsel for the said Alvin R. Dunton, and Mr. George Raines, the district attorney of and in and for the said county of Monroe, of counsel for the said The People of the State of New York, and this court having duly considered the same and deliberated thereon—

It is hereby ordered, determined, held, and adjudged that the said conviction, and all records and entries thereof or concerning the same, were, and are, erroneous and illegal, and should be held for nought and reversed; and they hereby are adjudged to be, and are held for nought, and null, and are reversed, vacated, annulled, and set aside, and are of no force, validity, or effect whatsoever.

All which we have caused by these presents to be exemplified, and the seal of our said supreme court to be hereunto affixed.

Witness: E. Darwin Smith, justice, at the city of Rochester, the fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-three, of our Independence the ninety-eighth.

[SEAL.] A. L. MABBETT,
Clerk.

I, E. Darwin Smith, justice of the supreme court of the State of New York, do hereby certify that Alonzo L. Mabbett, whose name is subscribed to the preceding exemplification, is the clerk of the said county of Monroe, and clerk of said supreme court for said county, duly elected and sworn; and that the signature of said clerk to said certificate is genuine, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

E. DARWIN SMITH.

Dated Rochester, N. Y., 15th Sept., 1873.

893 STATE OF NEW YORK,
County of Monroe, ss:

I, Alonzo L. Mabbett, clerk of the supreme court of said State, in and

for the county of Monroe, do hereby certify that E. Darwin Smith, whose name is subscribed to the preceding certificate, is justice of the supreme court of said State, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 15th day of Sept., 1873.

[SEAL.] A. L. MABBETT, *Clerk.*

Defendant's Exhibit "TT."

DISTRICT OF MASSACHUSETTS, *to wit,*
District Clerk's Office:

[SEAL.]

Be it remembered, that on the thirteenth day of August, anno Domini 1852, Tappan & Whittemore, of the said district, have deposited in this office the title of a chart, the title of which is in the words following, to wit: Struck by A. R. Dunton, 228 Washington street. The right whereof they claim as proprietors in conformity with an act of Congress entitled "An act to amend the several acts respecting copyrights."

ELISHA BASSETT,
Clerk of the District, pro tem.

[Extracts from the copyright law of 1831.]

"And the author or proprietor of any such book, map, chart, 894 musical composition, print, cut, or engraving, shall within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver, or cause to be delivered, a copy of the same to the clerk of said district."

"SEC. 5. And be it further enacted, that no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted in the several copies of each and every edition published, during the term secured, on the title-page, or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: "Entered according to act of Congress, in the year , by , in the clerk's office of the district court of , (as the case may be.)"

[Extract from the act of 1846, to establish the Smithsonian Institution.]

"SEC. 10. And be it further enacted, that the author or proprietor of any book, map, chart, musical composition, print, cut, or engraving, for which a copyright shall be secured under the existing acts of Congress, or those which shall hereafter be enacted respecting copyrights, shall within three months from the publication of said book, map, chart, musical composition, print, cut, or engraving, deliver, or cause to be delivered, a copy of the same to the librarian of the Smithsonian Institution, and one copy to the Librarian of Congress Library, for the use of the said libraries."

(Endorsed:) Certificate of copyright. Dunton.

Copyright of seven books was secured in Dec., 1854, by record in the office of clerk.

895 *Defendant's Exhibit W W.*

In the matter of the interference between the applications of Samuel D. Hovey, Joseph Illfelder, Philip Hufeland, J. Reckendorfer, and T. H. Müller, for letters-patent for an improvement in eraser-attachments to lead-pencils.

APPEAL FROM THE BOARD OF EXAMINERS-IN-CHIEF.

Reckendorfer has withdrawn his application, acknowledging p'iority of invention to Illfelder, and Müller was correctly held by the examiner of interferences to have been improperly joined in interference, his inventions not being identical with that of the other parties.

A question as to the identity of the inventions covered by the remaining three applications has been raised by counsel for Hufeland and Illfelder. In declaring the interference the examiner states that the subject-matter involved "consists in attaching a slender rubber eraser to a wooden lead-pencil by a ferule, constructed of a material which can be readily cut by a knife, and which at the same time extends over the rubber, and forms a protector and stiffener for it." It is alleged that Hovey has done no more than to unite the eraser with the end of a pencil by a paper tube or ferule, while the other parties have done that, and have also encased the rubber, its entire length within the tube, intending that the latter shall be cut away to expose the end of the rubber as it wears off.

Upon a careful examination of the two devices as described and represented, I am satisfied that this point is well taken. Hovey shows a shorter rubber than the other applicants; and yet it projects from the tube nearly half its length, while their tubes cover the rubber to its outer end, and must be cut away slightly before the eraser can be used. Besides, the main portion of his tube is shown covering his pencil while the other applicants use the greater part of their tubes to enclose and protect the rubber, which is an important object. Again, Hovey
896 shows his rubber secured by a nail in the ferule. Although he does not confine himself to this means of fastening, the fact that he employs it at all shows that he did not contemplate the advantage of extending his ferule so as to enclose and stiffen an elongated eraser, and be cut away to accommodate itself to the wear of the latter.

In fact the construction he presents precludes this advantage. His rubber and ferule are both so short that the latter merely forms a joint connection, and cannot be cut away without detaching the former. That its only function is to form an attachment appears also from his testimony that the pencils he manufactured and sold, as set forth in his preliminary statement, all had the paper ferule and rubber enclosed by a "large sliding steel tube to keep the rubber clean." (Hovey, cross-int. 9.) They were all of the pattern shown in fig. 3 of his drawing.

A much slighter difference in construction than appears between these cases was recognized as distinguishing a device from others that had preceded it, and conferring patentability in the case of W. N. Bartholomew, Commr's Dec., 1871, p. 298. There was about the same difference in the extent of the tubing between the well-known rectangular eraser with the middle part encased in wood, and the Bartholomew eraser that there is between the alleged invention of Hovey and that of the others. It was also shown that artists' stubs had been wrapped with paper throughout their entire length. Yet, because the eraser was encased its entire length so as to be cut away for use, and the paper wrapping

was secured with glue, thereby giving a peculiar stiffness and rigidity to the cylinder of rubber, it was decided that Bartholomew was entitled to a patent. Following the analogy between the cases, I must hold that there is a patentable difference between the invention shown by Hufeland and Illfelder and that exhibited by Hovey.

The claims, it is true, by their terms appears to conflict, and there is no way to compel their respective limitation or alteration, except by showing a reference other than the cases in interference. If they do in
897 fact conflict, this interference must determine who is entitled to a patent upon them as presented. But, considering the actual difference between the devices as shown and described, is there really any conflict, and, if so, to what extent?

A claim is to be construed in the light of the specification which it accompanies and supplements.

Under this rule, which is of universal application, Hovey's claim will only secure to him the uniting of the eraser and pencil by a paper ferule, for this is all his specification comprehends, and he claims the combination of these three parts "substantially as set forth." To this extent, then, the question of priority must be adjudicated, because the device in this state of development is covered by all the applications. In the language of the board: "All the parties embrace in their claims a lead "pencil, and an India-rubber eraser of a corresponding form, which are united end to end by a paper sleeve." Hufeland and Illfelder, it is true, go further than this, and show the sleeve extended so as to wholly envelope, stiffen, and fully protect the eraser, of whatever length it may be, but it is evident that they also exhibit the elements of the broader claim of Hovey. If Hovey is the prior inventor, so far as the eraser and pencil merely united by a paper ferule is concerned, and the invention thus broadly stated is patentable, then, in my opinion, he may, with propriety, be allowed his claim; and, by incorporating a proper disclaimer, clearly limiting the invention to what is shown beyond that which appears in Hovey's case, one of the other parties may also be allowed his claim.

Hufeland's application was filed May 3d, Illfelder's, July 24th, and Hovey's August 18th, 1871. If Illfelder's testimony is sufficient, and is to be believed, there is no question but that he is entitled to judgment of priority of invention. It sets forth that he made the invention in question, some time in the summer of 1869, in Europe, and shipped samples from Furth, Bavaria, which arrived in New York the last of July of that year. But, upon a careful examination of this evidence, I am unable to find sufficient proof that the samples alleged to
898 have been shipped ever arrived in this country. No correspondence or other documentary evidence of their reception is produced; on the contrary, the invoice from the New York custom-house, which, according to the testimony of Reckendorfer, should show a record of these samples, goes to show that they were not received. None of the alleged samples are produced, nor is their disappearance satisfactorily accounted for. To my mind, as it seems also to have appeared to the mind of the examiner and board, the evidence seems entirely insufficient, and in some respects incredible, and I cannot regard Illfelder as having proved any invention in this country at all.

Hufeland alleges in his preliminary statement that he "made experiments in making paper tubes or receptacles for holding rubber erasers" about the middle of the year 1869. But this does not comprehend the invention in controversy. From that date he did nothing until "about February, 1871," when he "formed other tubes of paper, so that they

could be attached to the ends of lead-pencils," and he at that time exhibited some of these rubber erasers and tubes applied to lead-pencils.

According to this statement he neither conceived nor completed the invention in question until February, 1871, and to this he must be held. It is presumed that a preliminary statement will be as favorable and contain as much for a party in interference as is consistent with the facts in his case. It must therefore be strictly construed, and the proof held to conform with it in all essential particulars. A date referring to something else than the invention cannot be used to let in testimony conflicting with the sworn statement of the date of the invention. (Allen & Moody vs. Gilman, Off. Gaz., vol. 2, No. 12.) Such of Hufeland's testimony, therefore, as tends to prove his invention of an earlier date than that given by him in his preliminary statement must be disregarded. This statement, however, is fully corroborated by unquestioned testimony, and, without doubt, Hufeland had the completed invention as early as February, 1871.

It is proven that Hovey made his invention, if it is an invention, in July or August, 1869.

899 In the fall of that year he took steps to secure a patent, and before May, 1870, he had manufactured and successfully introduced his alleged invention on a large scale.

He is clearly, in my opinion, entitled to judgment of priority upon what he has shown, and to that extent the decision of the board is affirmed. But as the examiner, in his declaration of the interference, seems not to have observed the difference between Hovey's device and that of the other applicants, and as his statements in treating the applications of Hufeland and Reckendorfer lead me to suspect that the state of the art may be such as to preclude the grant of a patent for this alleged invention, Hovey's application is remanded to the primary examiner for further investigation as to the patentability of the device therein described and claimed.

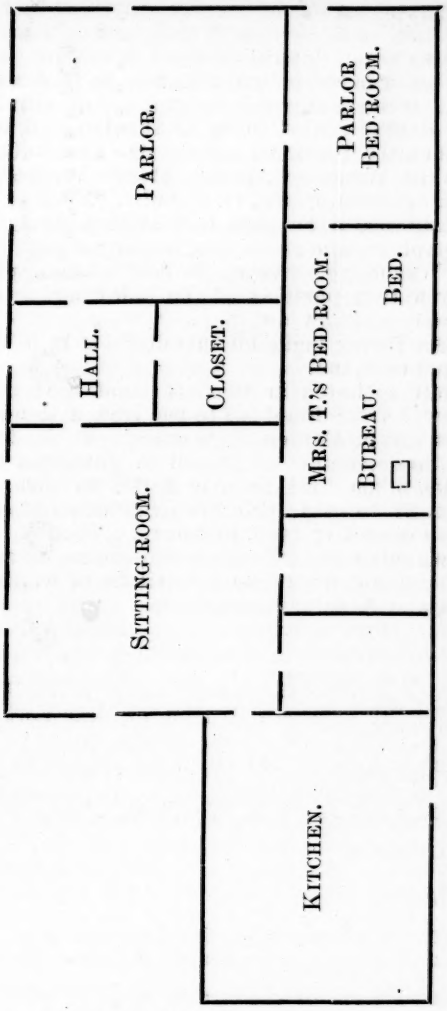
From the preceding discussion of the question of priority, it follows that, so far as the specific invention described by Illfelder and Hufeland is concerned, judgment must be given in favor of Hufeland.

As already intimated, however, his claim is somewhat indefinite and ambiguous. Upon amending this claim so as to restrict his invention to the device described, he may be allowed a patent.

J. M. THACHER,
Acting Commissioner.

OCT. 28, 1872.

900 *Defendant's Exhibit Y Y.*



Defendant's Exhibit ZZ.

I gave Mr. Dunton the pencil the Saturday evening he arrived.
R. B. THOMAS.

901 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the second day of March, in the year of our Lord one thousand eight hundred and seventy-four:

Present, the honorable Lewis B. Woodruff, circuit judge.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

This cause coming on in due course for final hearing upon the pleadings and proofs, and the complainant having moved, as preliminary to said hearing, and on the said pleadings and proofs, and all the proceedings herein, and on due notice, to strike the depositions of the following witnesses from the defendant's proofs, viz: Martin O. Tower, Albion Drake, Miles Fuller, Warren C. Tower, Martin W. Tower, Francis M. Tower, William H. Norton, Daniel O. Quimby, James H. White, George H. Bundy, and Ambrose Herriman; and after hearing Mr. Blake and Mr. Wetmore, complainant's counsel, in support of said motion, and Mr. Gifford and Mr. Washburn, defendant's counsel, in opposition thereto, it is hereby ordered that portions of the following depositions be and the same are hereby stricken out, namely: that part of the deposition of Martin O. Tower included in folios 756 to 771 of the defend-
902 ant's printed case, inclusive; that part of the deposition of Warren C. Tower, included in folio 831; that part of the deposition of Martin W. Tower from folio 845 to the end of the deposition; that part of the deposition of Francis M. Tower from folio 976 to the end of the deposition; the deposition of Daniel O. Quimby, except folios 1377 to 1380, folio 1390, folios 1394 from cr.-int. 1 to 1399, inclusive, folios 1410 from cr.-int. 27 to 1411, inclusive; the deposition of George H. Bundy, except folios 1461 to 1465, inclusive.

And that the whole of the following depositions be and the same are hereby stricken out, namely: The deposition of William H. Norton, James H. White, and Ambrose Herriman.

(Signed) L. B. WOODRUFF,
Circuit J.

903 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the second day of March, in the year of our Lord one thousand eight hundred and seventy-four:

Present, the honorable Lewis B. Woodruff, circuit judge.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.

The above cause coming on for final hearing upon pleadings and proofs, Mr. Edmund Wetmore is heard in behalf of the complainant.

904 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the third day of March, in the year of our Lord one thousand eight hundred and seventy-four:

Present, the honorable Lewis B. Woodruff, circuit judge:

JOSEPH RECKENDORFER
vs. In equity.
EBERHARD FABER.

This cause being still on hearing, Mr. Edmund Wetmore concludes his argument in behalf of the complainant.

Mr. Washburn is heard in behalf of the defendant.

905 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the fourth day of March, in the year of our Lord one thousand eight hundred and seventy-four:

Present, the honorable Lewis B. Woodruff, circuit judge.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } In equity.

The above cause being still on hearing, Mr. George Gifford is heard in behalf of the defendant.

Mr. Charles M. Keller is heard in reply.

C. A. V.

906 Circuit court of the United States for the southern district of New York. In equity.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER. } February term, 1874.

Before Hon. Lewis B. Woodruff, J.

Decision, May 20, 1874.

The bill of complaint herein charges the defendant with infringing three several patents: one issued March 30th, 1858, to Hymen L. Lipman, for a combination of a lead-pencil and eraser, extended on the 25th of March, 1872, for a further term of seven years, from the 30th of March, 1872, and assigned to the complainant; one granted to the complainant on the 4th of November, 1862, and re-issued on the 1st of March, 1872, for an improvement in pencils; and the third granted June 4th, 1872, to Teilè Henry Müller, for an improvement in lead-pencils, and assigned to the complainant.

The answer denies that the respective patentees are the first inventors of the improvements claimed, denies that the defendant has infringed such patents, alleges that the patents are void on various grounds, but especially (by original and amended answer) avers prior invention, knowledge, and use of the devices in question by various persons named, and that the invention had been in public use and on sale for more than two years prior to the respective applications for such patents.

907 The patent thirdly named in the bill of complaint does not appear in evidence, and was not the subject of examination or discussion on the hearing. There is, therefore, no occasion to notice it further.

The patent to Lipman in its specification describes the invention thus: "I make a lead-pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size (A) and insert in this groove a piece of prepared India rubber (or other erasive substance) secured to said pencil by being glued at one edge. The pencil is then finished in the usual manner, so that on cutting one end thereof you have the lead, (B,) and on cutting the other end you expose a small piece of India rubber (C) ready for use, and particularly valuable for removing or erasing lines, figures, &c., and not subject to be soiled or mislaid on the table or desk."

At the conclusion the patentee states and claims, "I do not claim the

use of a lead-pencil with a piece of India rubber or other erasing material attached at one end for the purpose of erasing marks; but what I do claim as my invention and desire to secure by letters-patent is the combination of the lead and India rubber or other erasing substance in the holder of a drawing-pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

The specification annexed to the re-issued patent to Reckendorfer declares: "My invention is intended to provide a means whereby articles of a greater size or diameter than the lead may be securely held in the head of a pencil of otherwise ordinary or suitable construction, without making the body of the pencil cumbrous or inconvenient. To this end my invention consists:

"First, of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed, to constitute a receptacle for an eraser or other similar article as hereinafter stated.

"Second, of a pencil the wooden case of which gradually tapers
908 from the enlarged and recessed head towards its opposite end for the whole or a portion of the length, as hereinafter set forth.

"The receptacle for the eraser or other article is formed in the head, without too much weakening the wood, owing to the form of the sheath, while for the same reason the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers, just as an ordinary pencil is." The further description shows that the groove in which the eraser is inserted is to be larger than the groove in which the lead is placed as in the Lipman pencil.

Next, "pencils of equal size throughout have been heretofore made with a slip of rubber fitted in in place of the lead at one end, but such pencils have not become of any considerable practical importance, in consequence of the smallness of the rubber, and it has been held impracticable to make the rubber much larger without too much weakening the wood or making the entire pencil thick and awkward to handle. By my invention the size of the rubber may be so increased, while that of the lead remains the same, as to render it a very effective eraser, the size of the pencil-head being such as to render it a convenient receptacle for a rubber of much more considerable size or diameter than the lead."

The claims are:

"1st. A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth."

"2d. A pencil the wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end for the whole or a portion of its length, substantially as shown and described."

Some observations made in the progress of the argument suggest the propriety of inquiring and of stating precisely what it is which these patentees profess by their invention to have improved. It was called
in the discussion an "article of manufacture" as distinguished
909 from a machine having operation or action, and in which combined parts may operate reciprocally or conjointly, so as to produce results due to their concurring influences. Without conceding that the distinction stated, can in its application to the subject of these particular patents have any influence on the inquiry whether any patentable invention is disclosed by the patents construed in view of the state of the art and of prior knowledge and use, it is proper to

say: The subject of these patents, though not involving the complication of devices which entitles it to be dignified as a machine, is nevertheless a tool or implement to be used or employed to produce useful results, as much so as a pen, a stamp for printing or embossing letters or figures, a hammer or a file. All these are but instruments and mechanical agents, which are to be operated by the skill of the user to effect a purpose. True, they are articles of manufacture and put on sale. So is almost every dsscription of tool, implement, and other mechanical device, which is of such general utility as to be the subject of general request in the market.

If there was a general demand for a particular machine of the most complicated combination of mechanical devices, it would be manufactured and be found on sale everywhere within the range of such general demand. To call the subjects of these patents articles of manufacture, in likeness to ready-made clothing, or food, or medicine, would not truly represent their character or functions.

It is a mechanical instrument as much as a pen knife, a cork-screw, a wrench, or a screw-driver; and the inquiry into its patentable character is, does it embody any new device or combination of devices producing a new result or an old result in a different manner?

As a means of producing a mark, there is no pretence of its novelty. Pencils of the same material, containing the same marking substance inserted in the same groove, were common before either of these patentees were born, and erasers, inserted in grooves, in wooden sheaths or
910 holders, are proved to have been in public use and on sale before either of the alleged inventions. The proofs establish that, for all the purposes to which the complainant's pencils are adapted, pencils, made by inserting a marking material in a groove in the centre of a stick, which in use is to be cut away to expose more and more of the marking material as it wears away or becomes blunted in use, were common. And erasers in like form of pencils, having the erasing material inserted in a groove in the centre of a stick, while in use is to be cut away to expose more and more of the erasive material as it wears off or becomes soiled or blunted in use, were made and on public sale. Not only so, these latter were of a size of sheath sufficient in strength to allow the use of the desired size in the erasing material. There were thus in known public use two separate instruments, each consisting of a wooden sheath or holder to protect its enclosure, and to be cut away as the use of the enclosed substance might require, one of them containing (grooved therein) a material for making marks (writing or drawing) and the other containing (grooved therein) an erasive material for removing marks, (writing or drawing.) Each was a specific instrument to be used to produce entirely distinct and even opposite results.

Not only so, experience had suggested the convenience of uniting these two instrumentalities in one implement; that is to say, the provision of a single or common holder for the marking material and the erasing material at opposite ends, so that each should be present or immediately in hand when the other was used. This was illustrated by the use of a metallic adjustable holder at one end grasping the marking material, and at the other grasping the erasing material, each made movable therein as it became worn, instead of cutting away the holder itself. More strikingly illustrated by implements made by attaching to the end of an ordinary wooden pencil a cap of India rubber held thereto by its own compression or by some metallic ring, band, or ferule; also by inserting the end of a pencil in the end of a tube in which India rubber was inserted at the other and outer end of any desired

911 size. I am constrained by what I deem the preponderance of the evidence to find also that before either of the alleged inventions of the above-named patentees, complete, practical, and useful pencils were made and put into open, practical use for several years for writing, drawing, and erasing, constructed by removing the lead from a portion of the groove in an ordinary lead-pencil and substituting therefor in such groove India rubber as an eraser. Thus a form of combined pencil and eraser was produced having one wooden sheath or holder, with lead as a marking material at one end and an eraser of India rubber at the other, the marking material and the erasing material being each strengthened and protected, and in use as they wore off more and more exposed by cutting away the wood of the pencil constituting their sheath. What, then, remains which could be the subject of a patent, there being no claim that the materials themselves or the process of preparation were in any sense *the* new?

This inquiry will be important to the question, how far the patents held by the complainant have any validity.

I. But first I prefer to inquire what, in view of this state of the art, the patents, construed most favorably to the patentees and assuming their validity, can be deemed to include; and next, whether, when so construed, the defendant has infringed the patents. The language of the specification aids in this inquiry by recognizing to some extent the state of the art above exhibited. Lipman declares that he makes a lead-pencil in the usual manner. As a mere lead-pencil it has no novelty, and he claims nothing therefor.

He inserts India rubber at one end, in which he makes a groove "of suitable size." This is quite indefinite. A suitable size may be large or small; it will depend upon the use to which it is to be applied. But his drawing shows a groove larger than that of the lead. This groove is to be made in the wood of the pencil. In terms he declares what, in view of what has already been suggested, he must have declared, that he
912 does not claim "the use of a lead-pencil with a piece of India rubber or other erasing material attached at one end for the purpose of erasing marks." He does claim the "combination of the lead and India rubber or other erasing substance in the holder of a drawing-pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

He cannot claim and does not claim to have invented broadly an implement which is a combined pencil and eraser; such implements were already in use. He cannot claim the mere combination of a lead-pencil with an eraser, the lead and the erasing material having a common sheath; that was not new. And for the same reason he cannot claim such mere combination when the sheath is of wood, susceptible of being cut away as the implement is worn by use, and this also forbids his claiming broadly every supposable mode of combining within the holder of a drawing-pencil the material for erasing with the lead of the pencil.

It follows that, if the patent of Lipman be sustained, it must be limited to the construction which is exhibited in his specification in those respects only in which it differs from those above described; that is to say, to the insertion in the pencil-holder of an erasing substance by means of a groove in such holder of dimension differing from the groove containing the lead. Other modes of attaching India rubber to the holder are both by the disclaimer and by the proofs excluded. Not only so, the drawings annexed to the specification of the Lipman patent, the specification itself, and the sample of the pencils manufactured under the patent, all concur in showing that the prominent feature of his al-

leged invention was the making of the wood of the pencil-holder the single instrumentality in containing and holding both the lead and the eraser, one end thereof being adapted thereto by an enlarged groove to receive the eraser. In view of the state of the art and the disclaimer in the patent, it cannot be construed as including a separate and distinct mode of securing the eraser to the end of a pencil.

913 It was therefore competent and lawful for the defendant to attach India rubber to a pencil by tying it thereto by a cord, securing it thereto by a separate band or collar or ferule of whatever material other than a practical extension of the wood of the pencil-sheath. Before the patent, India rubber had been attached by insertion in a metallic tube placed on the end of a pencil. What the defendant is proved to have done is to sell pencils having a paper tube placed on the end of a pencil with India rubber inserted therein. This is not a pencil "constructed and arranged in the manner" set forth in the specification annexed to the Lipman patent, limited as it must be by the state of the art and the disclaimer of the patentee. In the Lipman pencil, the device for holding the lead of the pencil and the eraser is single, and is definitely so described, with an exclusion of other modes of attaching the eraser to the pencil-holder. In the defendant's pencil, the pencil-holder does not contain the eraser, but such eraser is attached and secured to the holder by other distinct means; the device for holding the lead and the eraser is double and complex, and to say that it is constructed substantially in the manner set forth in Lipman's specification seems to me impossible.

It is argued that, because the paper sheath can be cut away as the eraser is worn, it should be deemed an equivalent to the wood enclosing the eraser in the Lipman pencil.

I am not willing to relax at all the just protection due to inventors against a merely evasive substitution of equivalents. But it will be seen that the present patent, if valid, is not broadly for a combination of lead, a holder, and an eraser, nor even for a lead and an eraser in the same sheath; it cannot be sustained except for a special construction of the containing holder, and that is not adopted by the defendant.

For the same reason, it is not material that in one respect the same result is produced, viz, that in each the sheath of the eraser can be cut away. If the construction is different, the mere producing of the

914 same result does not make the defendant's device an equivalent where the special construction is the distinguishing and patented feature of the thing patented.

My conclusion is, therefore, that if the Lipman patent can be sustained at all, its true construction is so limited by the state of the art and the disclaimer of the patentee that the defendant's pencil is no infringement.

The Reckendorfer patent is based upon that granted to Lipman, or rather it is applied to pencils constructed in like manner; so that if the defendant does not infringe the one he does not the other.

It would be absurd to say that making one end of a lead-pencil larger than the other would be patentable. But, if it were patentable, the proofs show that pencils so made were not new, but were made and in use and on public sale before the patent to Reckendorfer, and that such pencils were so made for the purpose of using the larger end to receive a cylindrical tube as a pen-holder, while the other was left conveniently smaller, containing the pencil-lead.

Again, Lipman also made pencils with an enlarged end to receive and hold the eraser. A pencil with a uniform taper providing for an en-

larged end to become the recipient of some other device was not new, and a pencil with an enlarged end to receive and hold an eraser was not new. There is little left, if anything, to be called invention, to be covered by Reckendorfer's patent.

But give him the most favorable view of his device, and it superadds to Lipman's devices the enlarged head and uniform taper of his pencil-holder. In the very terms of his claim, it adopts the wooden sheath of Lipman recessed to constitute a receptacle for the eraser, and the wooden case gradually tapering from its recessed head towards its opposite end.

The considerations which lead to the conclusion that the defendant does not infringe the Lipman patent must, under the proofs above lastly referred to, result in holding that the defendant is not shown to infringe either patent.

915 II. The conclusion that the patents cannot, in view of the state of the art and of the disclaimer in the Lipman patent, be so construed as to charge the defendant as an infringer, renders it unnecessary to consider the case further.

But I do not wish to be regarded as affirming the validity of the patents relied upon by the complainants.

What did Lipman do or discover which can be called invention? Sticks grooved, and containing in the groove a marking substance (black lead and other materials) adapted to cutting away the wood as the marking-substance was worn off, were common. Sticks containing an erasing material in a precisely like groove, and adapted to be cut away in like manner, were common, and the groove in these was of "suitable size" to admit a useful eraser.

Sticks are also proved to have been in use or on sale of precisely the same construction, having one kind of substance inserted at one end (for a pencil-eraser) and another kind of erasing substance inserted at the other end, (for an ink-eraser.) Combination of erasers and lead in the same stick-holder was not new. If the pencil was not new, and the eraser was not new, and the combination of the two was not new, was it invention to suggest that theretofore the erasive material thus combined was not large enough for many uses, and thereupon increase its size, when to do so was simply to do what had before been done in separate erasers? Or, to lay out of view what was proved to have been done before by Dunton and others in making and using pencils with India rubber inserted in a portion of the groove originally containing the lead, and so assuming that a combined pencil and eraser had not before been made in one single sheath or handle, what, then, did Lipman invent?

There was the pencil and here was the eraser; each had its own holder or sheath. If he had spliced the two together for convenience in use, tying them with cord or fastening them with glue, would that have been a patentable invention?

916 Would the man who first put the two blades of a knife in one handle instead of one only be an inventor? And would he be any more so, if one of the blades was a file, such file-blades having been in common use in a like separate handle?

If to attain the utility and convenience which the union of two implements produces, something new in construction of the implements, or some new device requiring thought or study, (more or less,) is necessary to unite them, such union may be patentable. But here each implement is constructed precisely as it was before, and the means of union was not in itself novel. It was like inserting two awls of different sizes or uses in one handle; or like the recent case before the Commissioner

of Patents, in which the alleged invention consisted in uniting a putty-knife and a glass-cutter in the same handle.

When the functions and uses of each are unaffected by the union, and the means of uniting has no novelty, it is not obvious, certainly, that anything of invention can be alleged of the combined implements. (Sawyer v. Bixby, 9 Blatch., 362.)

That the aggregated result may be very convenient, may for that reason be popular and may find a ready sale, and that such sales are very large and show a great demand, does not determine the question. As suggested in several cases relating to aggregation as distinguished from patentable combinations, the aggregate result may be the production of a better structure as an aggregate than was ever before produced; and yet, for the lack of novelty of device or new result produced by the aggregation and due thereto, it may have no patentable quality.

(Hailes v. Van Wormer, 7 Blatch., 443, affirmed in Supreme Court, 5 Pat. Off. Gaz., 89; Sawyer v. Bixby, 9 Blatch., 362; Sarven v. Hall, Ib., 524, 539; Ex parte Van Wagenen, 1 Pat. Office Gaz., 89; Prindle, Ib., 404; La Duc, Ib., 549; Monce v. Adams, Ib., 1; Castle, 4 Ib., 179; Morse, 3 Ib., 468.)

917 Whether these suggestions must lead to the unqualified declaration of the invalidity of the patents or not, they certainly confirm the point above firstly considered—that if the patents can be sustained, they are limited to the special construction of the pencils specified, and which the defendant does not infringe.

This is sufficient to dispose of the case.

The bill must be dismissed.

918 At a stated term of the circuit court of the United States of America, held in and for the southern district of New York, at the court-house in the city of New York, on the 27th day of June, 1874:

Present, Hon. Lewis B. Woodruff, circuit judge.

JOSEPH RECKENDORFER, COMPLAINANT,
vs.
EBERHARD FABER, DEFENDANT.
} In equity.

This cause having come on to be heard upon the pleadings and proofs taken and filed in said cause, and having been argued by Charles M. Keller, Charles F. Blake, and Edmund Wetmore, esqrs., counsel for the complainant, and John S. Washburn and George Gifford, esqrs., counsel for the defendant—

Now, therefore, upon consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and de-
919 cree, that the complainant's said bill of complaint be, and the same is hereby, dismissed, and that the said defendant, Eberhard Faber, do recover of the said complainant, Joseph Reckendorfer, the sum of nine hundred and forty-one $\frac{90}{100}$ dollars, his costs and disbursements of this cause, as adjusted by the clerk of this court; and that the defendant have execution therefor.

(Signed) L. B. WOODRUFF,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In equity. Joseph Reckendorfer, complainant, vs. Eberhard Faber, defendant. Decree. John S. Washburn, defendant's solicitor.

Take notice that the within decree will be presented to the Hon. Lewis B. Woodruff for settlement, at the court-house in the city of New York, on the 10th day of June, 1874, at 11 o'clock a. m.

Dated June 6, 1874.

JOHN S. WASHBURN,
Defendan'ts Solicitor.

To Messrs. KELLER & BLAKE,
Complainant's Solicitors.

Service of a copy of the within proposed decree, and of the notice, of which the above is a copy, is hereby admitted.

Dated Juhe 6, 1874.

KELLER & BLAKE,
Complainant's Solrs.

Approved as to form.

EDMUND WETMORE,
Complainant's Counsel.

Filed June 27, 1874.

920 United States circuit court, southern district of New York. In equity.

JOSEPH RECKENDORFER, APPELLANT,
vs.
EBERHARD FABER, APPELLEE.

To the honorable the Supreme Court of the United States:

The appeal of Joseph Reckendorfer, appellant, complainant above named, respectfully showeth: That upon the first day of July, 1872, the above-named complainant filed his bill in the circuit court of the United States for the southern district of New York against the above-named defendant, alleging that the defendant had infringed the rights of the complainant therein as secured to him by the extended letters-patent of the United States, granted the thirtieth day of March, 1858, to one Hymen L. Lipman, the title to said letters-patent having become vested in the said complainant, and also the rights secured to him
921 by the United States letters-patent granted to the said complainant, Joseph Reckendorfer, on the 4th day of November, A. D. 1862, and re-issued on the first day of March, A. D. 1870, and also the United States letters-patent granted one Tiele Henry Müller on the 4th day of June, A. D. 1872, the title to which said letters-patent last above mentioned was alone vested in the complainant in said bill by duly-drawn deed of assignment, and said bill of complaint prayed for an accounting and paying over all profits and damages, and also that writs of subpœna, injunction both preliminary and perpetual, might be issued against said defendant, his clerks, attorneys, agents, servants, workmen, &c.; that said defendant appeared and answered said complaint, and in said answer admitted, upon information and belief, the grant and extension and re-issue of the said several letters-patent, as alleged and set up in said bill of complaint, but denied that said extension and re-issue were obtained lawfully, and denied that the said several inventors, as set up in the said bill of complaint, were the original, true, and first inventors; but he alleged that the same and
922 all material and essential parts of said several inventions had been known and used by many persons and at divers places,

stating where and by whom such prior knowledge was had; and in an amendment to said answer, also, he further denied the validity of complainant's patents, and cited more persons who had prior knowledge and use of the alleged inventions as set up in the bill of complaint.

That the general replication was duly filed in said cause, and after taking testimony was argued by counsel for the respective parties.

That on the 29th day of June, A. D. 1874, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed that the complainant's bill of complaint should be dismissed with costs, and that said costs should amount to the sum of nine hundred forty-one $\frac{90}{100}$ dollars, being costs and disbursements, and that the defendant should have execution therefor.

Wherefore, this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent
923 to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of said circuit court and every part thereof may be reversed, and a decree made dismissing said libel, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, July 1st, 1874.

KELLER & BLAKE,
Solicitors for Appellant.
EDMUND WETMORE,
Of Counsel.

(Endorsed:) Supreme Court of the United States. Joseph Reckendorfer, appellant, vs. Eberhard Faber, appellee. Appeal to Supreme Court. Filed July 8, 1874.

924 Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOSEPH RECKENDORFER
vs.
EBERHARD FABER.
} Bond for costs.

Know all men by these presents that we, Joseph Reckendorfer, appellant, of the city of New York, and James H. Hoffman, No. 113 West 47th street, & Bernard Illfelder, No. 127 East 56th street, both of New York City, as sureties, are held and firmly bound unto the above-named Eberhard Faber in the sum of two thousand dollars, to be paid to the said Eberhard Faber, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named Joseph Reckendorfer has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Joseph Reckendorfer shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good,

then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JAMES H. HOFFMAN.
BERNARD ILLFELDER.
JOSEPH RECKENDORFER.
ISAAC HIRSCH, *Atty.*

Sealed and delivered, and taken and acknowledged, this 30th day of June, 1874, before me.

PHILLIP ABBOTT,
Notary Public, New York County.

925 UNITED STATES OF AMERICA,
Southern District of New York, ss:

James H. Hoffman & Bernard Illfelder, each, being duly sworn, do depose and say, each for himself, that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

JAS. H. HOFFMAN.
BERNARD ILLFELDER.

Sworn to this 30th day of June, A. D. 1874, before me.
[L. S.]
PHILLIP ABBOTT,
Notary Public, New York County.

The foregoing bond is approved as to form and amount, and the sufficiency of the sureties, July 7, 1874.

SAML. BLATCHFORD, *D. J.*

The within bond approved as to sufficiency, form, and verification.

JOHN S. WASHBURN,
Dfts. Solr.

(Indorsed:) Vol. , page , U. S. circuit court. Joseph Reckendorfer, appellant, vs. Eberhard Faber, appellee. Bond for costs on appeal to Supreme Court of the U. S. , proctor. Filed this 8th day of July, 1874.

926 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York.

To EBERHARD FABER:

Whereas Joseph Reckendorfer has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said Eberhard Faber, and has filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the 12th day of October, 1874, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 7th day of July, in the year of our Lord one thousand eight hundred and seventy-four.

SAML. BLATCHFORD.

(Endorsed:)
Supreme Court of the United States. Reckendorfer, appellant, vs. Faber, appellee. Citation on appeal.

Copy of within and inspection of judge's signature hereto had
927 this 8th day of July, 1874.

JOHN S. WASHBURN,
Defts. Solr.

Filed July 10th, 1874.

928 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 927 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Joseph Reckendorfer against Eberhard Faber, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 3d day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk.

(Indorsement on cover:) No. 215. Joseph Reckendorfer, appellant, vs. Eberhard Faber. S. New York, C. C. U. S. Filed 6th August, 1874.

REC. 215—33

Supreme Court of the United States.

OCTOBER TERM, 1875. No. 215.

JOSEPH RECKENDORFER,

Appellant,

against

EBERHARD FABER.

Appeal from Circuit Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

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Supreme Court.

OF THE UNITED STATES.

JOSEPH RECKENDORFER,
Appellant,

vs.

EBERHARD FABER,
Respondent.

October Calendar, 1875.

No. 215.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court for the Southern District of New York, entered the 27th day of June, 1874, dismissing the bill of complaint, which was filed to restrain the infringement, by the respondent, of certain Letters Patent, and for an accounting and damages.

Three Letters Patent were set forth in the bill, but two only were the subject of controversy, and will be considered on this appeal.

These patents relate to the manufacture of combined pencils and erasers.

I. The first was granted to Hymen L. Lipman March 30, 1858, and was extended for a further term of seven years from the 30th of March, 1872.

The material parts of the specification are as follows:

"I make a leadpencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, *A*, and insert in this groove a piece of prepared india-rubber (or other erasive substance) secured to said pencil by being glued at one edge; the pencil is then finished in the usual manner, so that on cutting one end thereof you have the lead *B*, and on cutting at the other end you expose a small piece of india-rubber, *C*, ready for use, and particularly valuable for removing or erasing lines, figures, etc., and not subject to be soiled, or mislaid on the table or desk.

"In making mathematical, architectural, and many other kinds of drawings, in which the lines are very near each other, the eraser is particularly useful, as it may be sharpened to a point to erase any marks between the lines; and should the point of the rubber become soiled or inoperative from any cause, such cause is easily removed by a renewed sharpening, as in the ordinary leadpencil."

The claim is as follows:

"I do not claim the use of a lead pencil with a piece of india-rubber, or other erasing material, attached at one end for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by Letters Patent, is the combination of the lead and india-rubber, or other erasing substance, in the holder of a drawing pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

The drawings forming part of the specification exhibit a continuous sheath of uniform size with interior, grooves of different sizes: the eraser groove being larger than the lead groove.

2. The second patent, is for an improvement upon the invention of Lipman, and was granted to Joseph Reckendorfer, the complainant, the 4th of November, 1862, and reissued on the 1st of March, 1872.

The material parts of the specification are as follows:

"My invention is intended to provide a means whereby articles of greater size or diameter than the lead may be securely held in the head of a pencil of otherwise ordinary or suitable construction without making the body of the pencil cumbrous or inconvenient. To this end my invention consists:

"*First.*—Of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed, to constitute a receptacle for an eraser or other similar article as hereinafter stated.

"*Second.*—Of a pencil, the wooden case of which gradually tapers from the enlarged and recessed head towards its opposite end for the whole or a portion of the length, as hereinafter set forth.

"The receptacle for the eraser or other article is formed in the head, without too much weakening the wood, owing to the form of the sheath, while for the same reason the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers, just as an ordinary pencil is."

The further description shows that the groove in which the eraser is inserted is to be larger than the groove in which the lead is placed as in the Lipman Patent.

The defect in the former implements, like Lipman's, in which the uniform diameter of the outer sheath rendered it impracticable to increase the size of the eraser groove beyond a certain point without too much weakening the holder, or else making the whole implement thick and awkward to handle, is there pointed out, and the advantage of the improvement claimed to be that thereby "the size of the rubber may be so increased, while that of the lead remains the same, as to render it a very effective eraser, the size of the pencil head being such as to render it a convenient receptacle for a rubber of much more considerable size or diameter than the lead.

The claims are:

"1st. A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth.

"2d. A pencil the wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end for the whole or a portion of its length, substantially as shown and described" (pp. 42, 43).

Articles made in accordance with the patents are in evidence. (Ex. Hirsch, 2 to 5, p. 116).

The defendant's implements, the manufacture and sale of which is the infringement complained of, are precisely like the patented implements, in every characteristic feature and cannot be readily distinguished from them. The only difference between the two is that the holder of the defendant's implements is made, for part of its length, of paper instead of wood, the preferred material of the patentees, and, in the process of making the holder, the paper part is first formed into a tube and then united to the rest of the holder so as to form one continuous holder for the whole instrument. This additional feature is the subject of a later patent to one Hufeland, under which the defendant seeks to justify his infringement (p. 493).

Specimens of the defendant's implements are marked Complainant's Exhibit 2, 3 and 4, (pp. 11 and 13).

The Court below decided that "if the Lipman Patent can be sustained at all, its true construction is so limited by the state of the art and the disclaimer of the patentee, that the defendant's pencil is no infringement;" and the bill was accordingly dismissed (fol. 914, p. 507 and p. 509).

The query is raised in the opinion of the Court whether the patents in suit have any validity ; but that question is not determined and the sole point actually decided, and upon which the decree of dismissal was based. is the one just stated (fol. 917, p. 509)

II.

Assignment of Errors.

The appellant submits that the decree of dismissal was erroneous:

1. Because founded upon an inconsistent and inaccurate construction of the patents in controversy, whereby the subject-matter of said patents was, in effect, treated as falling under the class of "machines" rather than under the class of "manufactures," and the said patents were regarded as patents for a process of construction, or for technical combinations, instead of patents for the combined implements as new articles of manufacture, having, when completed, certain structural peculiarities and novel properties of great utility (fol. 909, pp. 504, 505).

2. Because said decree was founded upon an erroneous construction of said patents, so far as it limited the same to implements in which the holder was made of wood exclusively, and by a process of construction strictly the same as that by which an ordinary pencil is made, and did not embrace implements having the characteristic features of the patented implements, but having the holder partly of wood and partly of paper, as shown in the infringing Exhibits (fols. 912, 913, pp. 506–7).

3. Because the said decree was founded upon erroneous findings of fact in regard to the prior state of the art, especially in this, that the learned Judge found that prior to Lipman's invention, combined pencils and erasers were "made by attaching to the end of an ordinary wooden pencil a cap of india-rubber, held thereto by its own compression, or by some metallic ring, band or ferule;" there being no evidence whatever that any such implements were so made, or were known to the art before the date in question, and also found, on evidence wholly insufficient to establish that fact as against the com-

plainant's patents, that before the inventions described in said patents "complete, practical and useful pencils were made and put into open practical use for several years, for writing, drawing and erasing, constructed by removing the lead from a portion of the groove of an ordinary leadpencil, and substituting therefor, in such groove, india-rubber as an eraser" (fols. 910, 911, pp. 505, 506).

4. The grounds upon which the validity of the complainant's patents was questioned, but not disaffirmed, in the Court below, are also erroneous.

1. So far as the said opinion suggests that the devising and making of the complainant's implements required no invention, and,

2. So far as said opinion suggests that said patents are to be regarded as invalid, as being for mere aggregations as distinguished from patentable combinations (fol. 915, 916, pp. 508–9).

III.

Argument.

First.—The inventions described and claimed in the complainant's patents are for new articles of manufacture, not for the method or mode of constructing them as distinct from the articles themselves, but for the instruments after they are made. The implement described in each patent, in accordance with the rule in such cases, is to be contemplated independent of any process, solely with reference to its distinctive individual qualities, as exhibited by comparison with other articles of its class (5 Off. Gaz., p. 490).

The Lipman Patent.

The discussion of the Lipman Patent, so far as relates to the questions of construction, novelty and

patentability will dispose of most of the questions relating to the Reckendorfer Patent, and it will therefore be convenient to limit the inquiries to be pursued, to the Lipman Patent, in the first instance, and thereafter to discuss the Reckendorfer Patent as to those points, only in which a separate consideration is necessary.

I. The learned Justice in the Court below held that the subject-matter of the patents, "though not involving the complication of devices which entitles it to be dignified as a machine, is nevertheless a tool or implement to be used or employed to produce useful results, as much so as a pen, a stamp for printing or embossing letters or figures, a hammer or a file; all these are but instruments and mechanical agents, which are to be operated by the skill of the user to effect a purpose; true they are articles of manufacture and put on sale, so is almost every description of tool," etc., but adds, "to call the subjects of these patented articles of manufacture in likeness to ready made clothing, or food or medicine, would not truly represent their character or functions," and that "the inquiry into its patentable character is, does it embody any new device or combination of devices producing a new result or an old result in a different manner?"

Fol. 909, p. 505.

The appellant respectfully urges that this statement of the subject-matter of the Lipman Patent is inaccurate, and suggests artificial and unfounded distinctions, not to be found in the Statute.

1. The Statute of the United States allows a patent to the inventor of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof." That general classification includes all the patentable subjects known to the law, and an invention must fall under some one of the four enumerated classes or it cannot be the subject of a patent.

The Lipman invention falls under the third class. It is an article of manufacture, as distinguished

from an art, machine, or composition of matter. The invention is stated in the specification to be that of a "new and useful leadpencil and eraser," (fol. 75, p. 40).

This point is not directly denied by the Court below, but a distinction is suggested between an article of manufacture, consisting of a tool or implement, and an article of manufacture consisting of food or medicine, or an article of clothing, like a shoe. It is said the tool is to be "operated by the skill of the user to effect a purpose."

Conceding that in this respect a tool, like a pencil or a pen, differs from an article of ready-made clothing, like a cravat or a shoe, the difference does not seem to be material, or to have any bearing on the question of the patentable character of either article. True, a pencil or pen must be used with some degree of skill, more or less, before it can accomplish the purpose for which it is made, and so must the cravat or the shoe be tied on and adjusted with more or less skill, before either can accomplish the purpose for which it is made; but in neither case does this fact determine the class of patentable subject-matter to which the articles belong.

The only question respecting a tool or implement claimed as an invention is: Shall it be classified as a machine or part of a machine, or as an article of manufacture. Of course all machines are in one sense articles of manufacture, but the classification of the patent law regards the primary character of the article, and its designation in ordinary and popular language.

The true test to determine in such cases, under which class an article should be ranged, is thus stated by Mr. Curtis, speaking in reference to a "tool or instrument."

"If the article is produced and intended to be sold and used separately, as a merchantable commodity, and the merit of it, as an invention, consists in its being a better article than had been before known, or in its being produced by a cheaper pro-

cess, then it may properly be considered simply as a manufacture. But if its merit appears only after its incorporation with some mechanism with which it is to be used, and consists in producing, when combined with such mechanism, a new effect, then it should be regarded as a machine, or an improvement of an existing machine."

Curt. on Pat., § 27.

Under this test, there is no doubt that the Lipman invention must be regarded as a manufacture. And as there are not one set of rules for determining the patentability of articles of manufacture of one kind, like pens and pencils; and another set of rules applying to articles of another kind, like shoes or cravats; but uniform rules applicable to all manufactures alike; the inquiry in the present case is, what are those rules, and does the Lipman invention fulfill their requirements.

2. The inquiry is important, because the appellant believes it was overlooked by the Court below, and that from that inadvertence an erroneous conclusion was reached.

Following out the supposed distinction between tools or implements, and other articles of manufacture, the learned Justice below states, as already quoted, that the inquiry into the patentable character of the Lipman invention is: "Does it embody any new device or combination of devices producing a new result or an old result in a different manner.

This inquiry is proper, if it is understood as di rected to an article of manufacture, rather than a machine, to a product rather than a process; but these distinctions do not seem to have been always preserved, in the discussion of the case contained in the opinion of the Court below.

The more usual form of the inquiry applicable to this class of cases, is that suggested in the quotation just given from Mr. Curtis' treatise, viz.: "Does the merit of it as an invention" consist "in its being a better article than had been known before," or that discussed in, *Lupton's Appeal* (5 Off. Gaz.,

489). What are the "distinctive individual qualities" of the Lipman implement, "as exhibited by comparison with other articles of its class?" That is to say, the primary inquiry is, what novel *properties*, what peculiarities of *structure* distinguish the article from those of the same general class made before.

If those novel properties are useful, and make it a better article, and if they are not due merely to comparative excellence of workmanship or material, as a question of degree, or to mere change of material, or to mere judicious selection, or to mechanical, as distinguished from inventive skill; then the article is a true invention, and entitled to a patent.

Lupton's Appeal, 5 Off. Gaz., 489.
Stanley Works *v.* Sargent, 8 Blatch., 344.
Masury *v.* Tiemann, id. 429.
Arkell *v.* J. M. Hurd, 7 Blatch., 475.
Strong *v.* Noble, 6 Blatch., 477.
Hawes *v.* Washburne, 5 Off. Gaz., 491.
Many *v.* Jagger, 1 Blatch., 372.

(3.) Having thus determined that the Lipman invention is to be regarded as a new article of manufacture, viz.: "a new and useful pencil and eraser."

The first question will be—following the rule above suggested:

Novelty.

What are its *novel properties*? In what respect does it differ from combined implements of the same general class made before?

The next inquiry is; Is the result of that difference *useful*? Is the implement by reason of the difference a better implement, and has a large demand and sale practically demonstrated its value? And finally are these useful properties, the product of mere superior workmanship or selection and not of *inventive skill.*

The answer to these questions will determine the question of patentability.

To ascertain in what respect the Lipman implement differs from those which preceded it, involves

the inquiry what those articles were, and what was the prior state of the art.

The implement described and claimed in Lipman's Patent, differs in essential particulars from any article of the same class shown to have previously existed.

No implement, forming a conbined pencil and eraser, is proved to have been known prior to Lipman's invention, which was substantially the same in structure and possessed the peculiar excellencies and properties, which belong to the implement Lipman devised.

Lipman's application was filed Jan. 10, 1857.

Prior to that time, ordinary wooden leadpencils were in common use. There were also made, as a separate implement, erasers in which the erasive material was enclosed in a wooden sheath.

The erasers had sometimes india-rubber of a different character at either end, so that ink erasing india-rubber was at one end, and lead erasing india-rubber at the other.

Crayon-holders were also known, consisting of a metallic double-claw, in which a piece of charcoal, chalk, or crayon could be held and clamped, and sometimes a piece of rubber was inserted in the claw and held at the other end.

Specimens of all these articles are in evidence.

(See defendant's Exhibits, S. T. Z.)

The following are the only implements consisting of a combined pencil and eraser, concerning which evidence was offered by the defendant with the intention of showing that they were in existence prior to Lipman's invention, and to a greater or less extent, anticipated said invention.

I. JOSEPH H. ADAMS, testified as follows:

"Q. Have you ever used a pencil having in any way combined with it an eraser, and if so, when first?

A. I have; I think it was first in 1849; but it might have been not until 1850.

Q. Please describe that pencil and eraser which you first used as stated, and produce, if able, a specimen of it?

A. On the head of an ordinary leadpencil, I placed what was called a barrel pen, with the point broken off, making a metallic cylinder, in the other end of which I placed a small piece of india-rubber or erasive material, which I whittled down, so as to fit within the cylinder where it was here held fast, and leaving a portion of it projecting from the cylinder for the purpose of erasing pencil marks. I have present the specimen which I have recently made, corresponding, as nearly as I can recollect, with the original article made by me. (Folio 485, p. 273.)

(The specimen is in evidence, marked "Defendant's Exhibit A.")

Q. To what extent did you use that pencil-eraser in making the map you have mentioned in 1849, and subsequently?

A. I had it on my desk, so that I could use it constantly, and used it as occasion required while making the map.

Q. Did the other gentlemen, who were in the office with you at that time see and examine the said pencil-eraser?

A. I don't know whether they did or not.

Q. Was it exposed to the inspection of them and any others who came into the office during that time?

A. I presume it was on my desk with the other tools that I was using, so that any one could have seen it, who came near the desk.

Q. To what extent, in fact, were the public accustomed to come into the said room and about your desk during that time?

A. With the exception of personal friends who came to see us, and a few employees of the office, there was no occasion for any of the public to come into the room.

Cross-examined :

Q. How many articles did you make similar to defendant's Exhibit A ?

A. I don't remember absolutely of making more than one (fol. 486, 487, and p. 274).

CHARLES EVERETT, a fellow draftsman, testified that he had seen in Mr. Adams' possession and on his desk, a "pencil similar to this Exhibit" (referring to defendant's Exhibit A).

COMMENTS ON FOREGOING TESTIMONY.

1. The article is materially different from Lipman's invention.

The rubber is not in the same continuous holder with the pencil, but attached to the end of the pencil ; it is squeezed into a metallic sleeve, which cannot be cut away, and does not allow any facility for sharpening the rubber, or for exposing a fresh surface, as it is worn away in use. It does not form a secure fastening to retain the rubber, and has none of the advantages and utility of Lipman's construction, and, indeed, nothing in common with the Lipman implement, except that each have one end intended to make marks, and the other end intended to erase.

2. The implement is a mere rude device, of which only a single specimen is proved to have existed, and that intended merely for private use. It never became an article of manufacture, and never had any public use. It falls far short of the requirements of an anticipating device. (Masury *v.* Tiemann, 8 Blatch., 429, and cases cited *supra.*)

II. JAMES A. PAGE, testified that prior to November, 1856, he had on his desk, while a school teacher, a pencil, which he describes as follows ; "The pencil, as I recall it, was a leadpencil with rubber at one end of it and lead at the other end ; it had a small

longitudinal piece of rubber inserted, and was cut away, so that the rubber was usable; that describes it in general; rubber was about the size of the lead; my impression is a little longer." (fol. 350, p. 197).

Cross-examined:

Q. Where did you get the implement in regard to which you have testified?

A. Can't say at this time.

Q. Did you ever take it apart?

A. Not to my recollection.

Q. What became of it?

A. I don't know; I don't recall having seen another like it, (fols. 351-352 p. 197-198).

COMMENTS ON FOREGOING TESTIMONY.

I. The witness is contradicted by GEORGE B. HYDE, called by complainant. Mr. Hyde, one of the oldest teachers in Boston, testifies that the said James A. Page, at the time when Page stated that he had the pencil in his possession, was his (Hyde's) assistant, Mr. Hyde says: I should think I was in his (Page's) room some two or three times a week.

Q. And on the occasions when you visited his room, did you have opportunity and occasion to see the writing implements which he had on his desk?

A. Yes, sir, (referring to pencil described by Page); I don't remember of seeing that pencil before; I never did (fol. 140, p. 77); I do say that I did and should know if he had any such pencils (fol. 141, p. 78); saw a pencil with a round rubber on the end raised up; with regard to the time, I cannot tell; they were in use in his school and mine (fol. 140, p. 77).

Cross-examined:

Q. Was the rubber in it (the pencil last referred to) inserted in the end of the pencil, similar to that in defendant's Exhibit E., now shown you?

A. I never saw one like it.

Q. How was the rubber attached?

A. The only one I ever saw that had rubber attached to it was fastened on to one end, raised up something like a small ball.

"I think it was not till after" removal to Springfield street (*i.e.*, after November, 1856). (Fol. 141, p 78.)

This explains Page's testimony. It is highly probable that both Page and Hyde testify in regard to the same implement; their description of it varies. Page says it was before November, 1856, Mr. Hyde says it was after.

Neither the *date* when the implement was used, nor the *construction* of the implement is proved with sufficient certainty to say what it was. Mr. Hyde directly contradicts Page as to any insertion of the rubber in the pencil. The burden of proof lies upon the defendant to defeat the patent; on such evidence it is not possible to hold that the existence of any implement substantially the same in construction as Lipman's is proved to have existed prior to January, 1857, within the strict rule of proof required in such cases, where the law requires "not conjecture, but certainty. (Wood *v.* C. Man. Co., 4 Fish. 559.)

III. The rejected application of *Joshua Gray* for a patent for a pencil and eraser was put in evidence by the defendant.

This application was made in September, 1856, a few months before Lipman's application. Its material parts are as follows: "My improvement consists in combining with a pencil, or the wooden part of the lead carrier thereof, a holder or cap, or the equivalent thereof, and a piece of india-rubber or elastic erasive material, whereby the erasure or rubbing out of a pencil line or mark may be readily effaced, simply by rubbing thereupon the said erasive piece of rubber.

"On one head of the pencil, I affix a notched head or socket-piece, *c*, holding a convex piece of india-

rubber, *d*, and having the same projecting from it."

"What I claim as my invention is combining with a pencil, by means substantially as specified, a piece of india-rubber or like material (fol. 883, p. 491).

This application was rejected Sept. 23, 1856 (fol. 875, p. 487).

COMMENTS ON THIS TESTIMONY.

1. There is no proof whatever that a pencil was ever made in accordance with this description or the accompanying drawing, or that the proposed device was ever reduced to practice, or was capable of reduction to practice. The learned Judge of the Circuit Court found, as a fact, that pencils were *made* in accordance with the plan set forth in the application, but no evidence whatever was offered to establish that fact, and no evidence in regard to the subject beyond the mere introduction of a copy of the application as an exhibit (fol. 910, p. 505 and p. 491).

It has been repeatedly adjudged that a rejected specifications and drawings are not *of themselves* evidence of the embodiment of what is therein contained, in a practical form, and, *unless* accompanied by proof of such practical embodiment, are not, evidence to anticipate a subsequent patent.

Graham *v.* Mason, 5 Fish., 1.
N. W. Fire-Extinguisher Co. *v.* Phila. Co., 6 Off. Gaz., 34.
Ellithrop *v.* Robertson, 4 Blatch., 307.
Parkhurst *v.* Kinsman, 4 Blatch., 489.
Teese *v.* Phelps, 4 McAll, 48.
Brown *v.* Guild, 7 Off. Gaz., 392.

In giving the opinion of this Court in the case last cited, Mr. Justice BRADLEY says:

"Were it not for the application for a patent, it would justly be regarded as an abandoned experiment, incapable of being set up against any other claim. Can the fact that such an application was

made and afterward voluntarily withdrawn, and never renewed, make any difference? We think not. Had a patent been actually granted to Remy & Kelly, it would have been different. The case would then have come directly within the seventh section of the Act of 1836, which makes a "patent," or a "description in a printed publication," of the invention claimed, a bar to a further patent therefor. But a mere application for a patent is not mentioned as such a bar. It can only have a bearing on the question of prior invention or discovery. If, upon the whole of the evidence, it appears that the alleged prior invention or discovery was only an experiment and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor cannot take the case out of the category of unsuccessful experiments," (7 Off. Gaz. p. 395).

In that case, evidence *de hors* the record was given as to the making of the machine which was the subject of the application, and the "whole evidence," record and extrinsic testimony combined, was adjudged insufficient to take the case out of the category of abandoned experiments. *A fortiori*, if the whole evidence consists of the production of a copy of the rejected application and drawing and nothing more, it is insufficient for any purpose whatsoever.

Rejected applications are not publications, "because," as stated by Judge McKennan (7 Off. Gaz. 36), "they lack the essential quality of a publication, in that they were not designed for general circulation, nor were they made accessible to the public generally. They were placed in the custody of the Commissioner of Patents, not that they might thereby become known to the public, but for the special purpose of being examined and passed upon by him.

"Although they might incidentally become known to any one whose researches in the Patent

Office might disclose their existence, they are not, therefore, published within the meaning of the Act of Congress.

"But it is said they establish the fact of invention, and so disprove the novelty of an invention subsequent in date. It is needless to refer to authorities, to show what is so well settled, that a written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws. * * * *

"However suggestive and valuable it may be, as an untried theory, it is ineffective against the practical and useful product of inventive skill."

But if a rejected application is not of itself evidence of the existence of an invention, identical with one for which a subsequent patent may be granted, how can it be evidence of the existence of an invention, or of a manufacture, or of anything "known to the art," to which the subsequent patent relates, which, although not precisely identical with the subject of the subsequent patent, is like it in some respects?

It is not even proof of what was "known in the art," before the patent, because a disembodied conception of a single person is no part of such knowledge. It does not pass into the common stock of knowledge until it has passed beyond the domain of theory into the proper domain of art, *i. e.*, when it has been proved by experiment, and given a tangible and practical form. Such record evidence may be pertinent in cases where it is relevant, to prove who had the first conception of what was subsequently embodied in an invention, but for the present purpose, viz.: to prove what was known in the art, and actually done, before Lipman's invention, the proof of what Gray conceived might be done, or suggested or asserted the possibility of doing, in an application for a patent, has no relevancy, and is of no effect whatever.

2. Even if Gray's conception should be carried

out, it would not anticipate Lipman's invention. The conception consists in placing upon the head of a lead pencil, which is shaped into a tenon for the purpose, a convex piece of rubber or "*elastic* erasive material," and holding it in place by what is called a "cap or holder," but which appears to be a ring or sleeve; not to mention other defects, this device renders it impossible to renew the rubber, or cut away the surrounding sheath to expose fresh portions for use; the material of which the holder or sleeve is to be formed is not mentioned in the specification, but by reference to the drawings, and in view of the purpose it is intended to serve, it is plain that it must be of some hard strong material like metal, and that, if cut away, the rubber would be detached; the rubber to be attached is evidently a bit of sheet rubber intended to be drawn over the head of the tenon, which is further signified by the expression in the description "*elastic* erasive material;" it should be more or less elastic, to be drawn over the head of the pencil holder; this would present a little ball, pea-shaped, at the end of the pencil, any renewal of which is plainly impracticable, and which, besides being unsuitable for fine erasing, is liable soon to become practically worthless from soiling; moreover the whole device is complicated, and correspondingly difficult and expensive of application.

It is not worthy of consideration, and it was inadvertence in the learned Judge in the Court below to take it into account in considering what was known and practiced in the art prior to Lipman's invention.

The said finding is still further erroneous in that it states that prior to Lipman's invention, implements were made "by attaching to the end of an ordinary wooden pencil a cap of india-rubber held thereto *by its own conpression.*" Gray refers to no such device. There is no evidence whatever of the existence of a combined pencil and eraser formed in the way suggested. Long subsequent to Lipman's invention,

and after the manufacture of combined pencils and erasers originating with Lipman's invention had become an established industry, such rubber caps were made and attached to pencils, and became the subject of a litigation which reached this Court, but none were ever made before Lipman's invention, and, although specimens of such pencils were referred to, by way of illustration in the course of this case, no evidence whatever was given concerning them, and the reference quoted shows an evident misunderstanding upon the part of the learned Judge as to the date when they were made.

IV. The pencils said to have been made by one Alvin R. Dunton.

Nearly the whole body of the voluminous testimony in the case, relates to the issue of fact raised concerning these pencils, and was taken by the defendant, in the effort to sustain the allegations concerning them.

This fact is indicative rather of the strenuousness of the effort made to destroy the patent, than of the importance which properly belongs to the contested fact, in its bearing upon the novelty of Lipman's invention.

The defendant examined some sixty-four witnesses upon this branch of the case, whose depositions consume nearly three-fifths of the whole printed record. The greater part of this evidence relates to side issues, and is without particular significance, and will not be discussed.

It is only necessary to consider those parts which bear directly upon the allegation to be proved.

For the proper understanding of the essential points in this evidence, it is requisite to give a brief outline of what the evidence is, and how it was introduced.

Alvin R. Dunton was not among those named in the original answer as having prior knowledge of Lipman's invention.

He was first put in communication with one of defendant's counsel, Mr. Thatcher, of Boston, January 2, 1873—after issue joined and *during* the time allotted to the defendant to take testimony in answer to the complainant's opening case. He was a writing teacher, and the story he told was as follows: He said that some time about the year 1852, he saw a cedar pencil which was lying split in two; that that suggested to him an idea, which he followed up by splitting an ordinary pencil for the whole or a part of its length, picking out a piece of the lead at one end, replacing the lead by a narrow strip of rubber, and fixing the parts together again either by glue or tying a piece of thread or string around them (fol. 375, p. 212).

That he used to make these pencils from time to time, as he needed them, and used them in writing or card marking.

When he first came to defendant's counsel in Boston, he had none of these pencils in his possession.

He was asked to reproduce the pencils, but those he made in obedience to this suggestion do not seem to have been satisfactory (fols. 676, 677, p. 378).

Many years before, and between the years 1855 and 1858, Dunton had made two or three brief visits at the house of one Mrs. Rachel B. Thomas, who was a family connection, and resided at the distant village of Camden, on the eastern coast of Maine. He had not been at this place, after having left it in 1858, for twelve years, but, according to his statement, had, in the interim, and before, taught writing at a great number of places, where he alleged he had used the pencils in question (fols. 677, 678, pp. 378-9).

He alleged that there was a trunk at Mrs. Thomas' containing some articles of his, and he wrote, as he stated, to Mrs. Thomas, requesting her to look in the

trunk and send him any pencils she might find with rubber in the end.

Neither the letter nor a copy was produced. Mrs. Thomas was said to have found what is known as a style, a small instrument used in card writing, which, when produced, had a minute piece of rubber fastened imperfectly at one end.

The style was of a convenient size to be sent in a letter, and was said to have been returned by Mrs. Thomas to Dunton in a letter, which letter also was not produeed, nor a copy thereof furnished (p. 240, fol. 424, 425).

This not meeting the requirements of the case, Dunton undertook the long journey from Boston to Camden, stating that if he went there personally he could find one of the pencils (folio 678, p. 379).

He arrived in Camden one afternoon, and according to his own story, he immediately called upon Mrs. Thomas, told her he had come to see if he could get a pencil that had rubber on one end; made no reference to his trunk, and gave her no directions where to look; told her she needn't look then, and went off down town; returned in a few hours and Mrs. Thomas told him she had found a pencil; the pencil was found by her in a bureau drawer, in her bed-room (folio 763, 427).

This pencil Dunton stated he had left at her house fifteen years before, and it had remained in the house the whole period without use or disturbance (folio 426, p. 241).

He returned to Boston with the pencil as a trophy (fol. 764, p. 427).

About this time he had accidentally met in Boston a son of Mrs. Thomas, called "Doctor" Silas C. Thomas (fol. 773, p. 432).

This man Dunton had not before met for years, and he testified in the subsequent course of the trial that he knew him to be of bad character (fol. 773, p. 432; fol. 768, p. 429; fol. 792, p. 443).

He swore that on parting with him many years before, he, Dunton, had knocked him down (fol. 773, p. 432).

Dunton recalled to this man his alleged use of the pencils in question, and at once found a ready and eager witness. He remembered the pencils perfectly, and that he had made similar pencils himself under Dunton's instructions (fol. 370, p. 209). He thought he could meet with a success similar to Dunton's if he could go to Augusta, Maine, where he had many years before left a box which, he had no doubt, contained one of said pencils (fol. 797, p. 446). He offered to go to Maine for the purpose, provided the defendant would pay his expenses, which he finally placed at the very moderate sum of five dollars (fol. 797, p. 446).

This was, however, refused, and the box was sent for from Augusta by express, and a pencil similar to that found by Dunton at Camden, was stated to have been found in it (fol. 791, 792, p. 443).

Dunton was now, in March, 1873, produced as a witness. He told the story of his alleged use of the pencils prior to 1857, and produced the pencil found at Camden. This pencil is known throughout the case as Exhibit E (fol. 376, 377, pp. 212, 213).

Mrs. Thomas, an old lady of seventy years of age, was brought from Camden to Boston at an inclement season, to tell how she found the pencil in her bureau (fol. 421, p. 238).

Silas Thomas was introduced with great respect as "Doctor" Thomas, and corroborated parts of Dunton's story, and produced the pencil from Augusta, Maine (Exhibit G). He declined when under examination, however, to assign to this pencil an earlier date than 1861 (fol. 364, p. 205).

A few other witnesses were produced by Dunton to speak to the general fact that they had seen him use pencils with rubber at one end.

Dunton's testimony was a surprise. Neither his name nor the name of any of the witnesses produced by him had been included in the names of those specified in the answer under the rule requiring the defendant to give the names of those upon whose prior knowledge or use he relies to defeat the

patent, nor had any motion been made or leave asked to amend the answer in this respect, during the two months or more Duntan had been in communication with the defendant.

Complainant's counsel, therefore, demanded thirty days before cross-examining Dunton, as a condition for permitting the answer to be amended, and in the mean time set to make some investigation of his most improbable and suspicious story (fol. 386, 387, p. 218.)

While this investigation was progressing, the man Thomas came forward and voluntarily offered to one of the complainant's employees to reveal a conspiracy to which he had been a party. He fulfilled this promise by stating in writing that Exhibit E was a fraud ; had been fabricated by Dunton for the purposes of the suit, the appearance of age being given by smearing his hands with ink and rubbing it into the wood of the pencil ; that Dunton carried it to Camden and concealed it himself where Mrs. Thomas found it, thus imposing upon the old lady (fol. 234-5, pp. 132, 133 ; fol. 256, p. 144).

The testimony of an accomplice being under such circumstances of no weight, the complainant directed his search for such independent facts as might corroborate or disclose the untruth of Thomas' confession.

His statement met with an unexpected verification. The pencil had upon it, on one side, a maker's stamp, "Rhodes & Sons, London," and on the other side the name of a firm partly cut away. The letters left were a final "k," succeeded by the words "& Blunt." Thomas said the pencil had been purchased in Boston, but could give no information as to who were the makers or where it was bought (fol. 235, 236, p. 133).

By inquiry among the trade, it was ascertained that there was a former firm in New York, for whom Rhodes' pencils were made, but the "Herrick & Blunt" pencils had been out of the market

for many years, and the "k & Blunt" doubtless was their stamp. An agent was employed to go to every stationer's store in the city of Boston, and ascertain if any of them had Herrick & Blunt pencils on sale (fol. 236, p. 133).

After searching through a number of stores, in an old store, kept by Gay & Co., in the lower part of State street, it was found that a few Herrick & Blunt pencils were left among the remnants of some old stock (fol. 236, pp. 133–4; fols. 104–5, pp. 56–7).

The complainants purchased all the pencils and then on inquiry, learned that Dunton, a man easily identified, had called once or twice at the store, just about the time of his visit to Camden, and had bought one of these pencils. His visit was remembered by the proprietor and his son, because of his unusual inquiry for old pencils (fol. 105, p. 57; fols. 134, 135, p. 74).

A comparison with Exhibit E, showed that the latter had been made from a pencil identical with those left in Mr. Gay's store.

It moreover appeared, that Dunton's story of his manner of finding the pencil at Camden was false. He had arrived on Saturday and made no mention of the occasion of his visit. He remained at Mrs. Thomas' house until the following Monday, and the pencil was not found by Mrs. Thomas until Monday afternoon, after Dunton had had ample opportunity to conceal it (fol. 279, p. 157; fol. 95, p. 51).

It was further proved that Dunton had the pencil in his possession in Camden, and Exhibited it outside of Mrs. Thomas' house, on Sunday, the day preceding the one on which Mrs. Thomas found it in her bureau (fol. 586, pp. 327, 328).

It further conclusively appeared that the date of Dunton's visit to Camden, when, as he alleged, he had left Exhibit E behind him, instead of being

the Winter of 1856 and 1857, the year *before* Lipman's application, was the Winter of 1857 and 1858, the year *after* Lipman's application (fol. 262, p. 148).

As to Exhibit G, supposed to have come from Augusta, it was discovered that when the exhibit had been produced, the box in which it was said to have been found, which had been sent from Augusta, had never been delivered, but was in the possession of the express company, unopened, the expressage not having been paid; and that this exhibit had also been fabricated by Dunton, or Thomas under Dunton's suggestion, to meet the exigencies of the suit. (pp. 163–167.)

An investigation into Dunton's antecedents showed that he was a man of bad character and associations; had been sentenced to the Penitentiary at one time in his career, and was a witness utterly unworthy of credit (fol. 254, p. 143.)

When it became known to Dunton that the complainant was following up the investigations which led to the foregoing disclosures, he exhibited the greatest excitement. He followed the complainant's agents from place to place, doing all in his power to baffle their efforts. He assailed them with abusive language and violent threats. He terrified Mrs. Barbour, a daughter of Mrs. Thomas, and an important witness in the chain of evidence against him, so that it was only possible to get her testimony by taking it at her own house, and from the period of his first appearance as a witness, forward, assumed, apparently, the same interest and share in the litigation as if he had been a party thereto (fol. 238, p. 134).

The evidence offered by the defendant through Dunton, and witnesses produced by Dunton, to meet or explain the evidence which disclosed the falsity of Dunton's alleged use of pencils like Exhibit E, prior to the date of the Lipman invention, and the fabrication of that exhibit itself, entirely failed to

overthrow the case against Dunton, and in some important particulars went far to confirm it.

The visit to Gay's store and the purhase of the pencils like those from which the exhibit was made, was admitted, but it was attempted to show that this purchase was on the day of Dunton's return from Camden, and not before he went.

It appeared, however, that he had made, in all, three visits to Gay's store, on two of which he bought old pencils, and that two, or at least one of these visits, had been made before his trip to Camden (fols. 103, 4, 5, pp. 56-7; pp. 74-5).

It further appeared that the visit made by Dunton on the day when he returned from Camden, had been prepared and planned by him beforehand.

He took with him a witness, for no other purpose than to be a witness, and visited certain stationery stores, until he gradually approached Gay's, where he ostentatiously bought one or two more of the pencils.

He then had the witness make a deposition to the fact, before he could have known that his obtaining the fabricated Exhibit at Gay's would be discovered or betrayed. This deposition was kept in reserve, and the witness not produced until the defendant's rebutting proofs were taken, (fol. 765, p. 428; fols. 688, 689, pp. 384-5; fols. 702, 703, p. 393.) He brought a cloud of witnesses intended to re-establish the correctness of the date of his visit to Camden, when he said he left Exhibit E behind him, but an analysis of the whole evidence on that point demonstrates that the date was subsequent to Lipman's invention; he introduced a mass of evidence intended to corroborate his original story, which was wholly inadmissible, and was stricken out by the Court below, without exception to the ruling; he introduced much evidence on behalf of the defendant, to impeach the character of Thomas for veracity, Thomas not having been called as a witness by the complainant at all, and having only

testified as a witness on the defendant's behalf. He proposed to re-establish his own character by procuring the setting aside of the record of his conviction, made twelve years before, by arrangement with the original prosecutor, entered into through one of the defendant's agents, only after the conviction was proved as a fact in this suit, and by a proceeding, the regularity of which setting aside it is impossible to believe; he also produced a quantity of certificates to character, all bearing the mark of his own composition, and introduces, as a general defense, witnesses who depose their belief that his tendency to questionable acts was due to insanity.

Such is a general outline of the evidence relating to the so-called Dunton pencils; upon such proof the complainant contends:

1. That it is established, beyond reasonable doubt, that the exhibits produced in evidence were fabricated.

2. That with this piece of false testimony at the foundation of Dunton's case, the witnesses he produces to corroborate a fact, which it was necessary to manufacture evidence to establish, are entitled to no credit. They are all brought forward by Dunton from his friends, family, or associates, and come from a corrupt quarter. Small faith is ever given to the mere memory of witnesses speaking as to particulars of the construction of a machine or implement long since gone out of existence, if the thing itself has not been preserved.

Still less reliance can be placed upon such testimony when enforced by exhibits fabricated to supplement it.

3. That the only legitimate conclusion from the whole evidence is, that the defendant, on whom the burden of proof lies, has failed to establish by satisfactory or sufficient proof, that any pencils like Exhibit E were ever made or used by any person prior to the date of Lipman's invention.

The important parts of the evidence verifying the foregoing statements and conclusions are as follows:

I. AS TO THE FABRICATION OF THE EXHIBITS E AND G.

First.—The plot to fabricate the evidence was discovered by the confession of Dunton's confederate, Silas C. Thomas.

SILAS C. THOMAS, was produced and examined as a witness by the defendant March 6th, 1873.

On the 15th of April, following, he made the following statement in writing to one of the complainant's counsel, Mr. Lincoln of Boston.

APRIL 15, 1873.

Mr THOMAS says: "The old English pencil was bought by A. R. Dunton, and the rubber inserted in it, in my presence, in his rooms; Dunton told Peter Thacher he thought he could find another pencil in Camden, Maine—an eraser pencil—that he had manufactured in 1855, that he left there; Dunton said he would go to Camden for $25, and went; when he came back, Dunton told me. By a little hocus-pocus game, I got that pencil into the bureau and made her search for it the next day, and she found it there.

"He made the pencil at room No. 9, 14 Tremont street; I got a note requesting me to call at his office about the 7th or 8th of February, and I went up there and I was in his office most every day; he made the pencil before he went to Camden; he went out and bought the oldest one he could find; he searched for a week for rubber to go back of the date; he had three kinds, then he glued it up with common glue; I went out and bought it at Doolittle & Smith's, and then he glued it when I returned; he went out and bought the rubber and pencil when I stayed there; he got some old rubber, made as far back as 1845, or so, I think.

"He (Dunton) asked my cousin and my aunt, who testified, to go and find some pencils; said they

must find some, and they did; they had said that all the pencils were burnt up; all this he can swear to (fol. 256, p. 144)."

S. C. THOMAS,

The next day Thomas called upon the complainant's agent, Mr. Illfelder, at the Parker House, Boston, and made the following confession.

"He said I" (Illfelder) "had very likely read his statement, and I should feel assured every part of it was true; said he felt very sorry that his mother got deceived; actually didn't know that she was to be drawn into it; and then went on and gave me the exact history of the pencil, Exhibit E. Said that Dunton bought an old pencil, picked out the lead, and then went out and bought rubber; that Dunton was perfectly delighted at having found an old pencil which was imported as long as twenty years ago, and also having succeeded in finding a piece of rubber of old age; he himself (Thomas) produced the glue; and after the pencil was finished Dunton dipped his fingers in ink and smeared it over the pencil; and after consulting said Thomas, whether the pencil looks old enough now, he, (Dunton) said he was rather afraid about the fresh glue, as they might discover it" (fol. 235, p. 133).

COMMENTS ON THIS EVIDENCE.

Sundry objections were made to the declarations of Thomas at the taking of the depositions, but as they were not passed upon at the hearing, and are not before this Court on any exceptions, they will not be considered.

These declarations are competent on two grounds:

1. As a confession of the complainant's witness, Thomas, that he was a party to, and assisted in, the fabrication of evidence.

2. As one step in the proof in the circumstance that, in consequence of the confession, other facts were discovered, tending to show that such fabrica-

tion of evidence actually occurred, and that such discovery was made conformably to the information given by the confession.

On the first ground, the confession proves that one, at least, of the complainant's witnesses, speaking of the alleged Dunton pencils, prior to 1857, to-wit: the witness, Thomas, is unworthy of credit.

On the second ground, the confession is one step in the proof that a conspiracy existed to manufacture evidence, and that such evidence was actually manufactured.

None of the arguments urged in the Court below, against the value of this confession, in any manner assail its force as evidence for the two purposes above enumerated, and it was offered solely for these purposes.

It is urged that the confession is not true because prompted by the promise of reward, or the desire of the witness, Thomas, to avenge himself upon Dunton because of an alleged quarrel between them.

But, for the first purpose for which the confession is introduced, viz.: to show that Thomas, one of the complainant's principal witnesses to the alleged use by Dunton of the disputed pencils prior to 1857, is a witness unworthy of credit, it is immaterial whether the confession is true or false. The fact that Thomas made such a declaration is the fact to be proved. That he deliberately stated that he was a party to a conspiracy to manufacture evidence, and impose the same on the Court and the parties; whether his motive in making such a confession was revenge, or the hope of a reward, or malice, or penitence, the fact that he made it shows him to be a witness, who, willing to proclaim his own infamy, is not to be believed. And that there may be no doubt left on that point, the defendant introduced afterwards voluminous testimony to impeach his character.

Moreover, neither of the motives alleged affect the character of the confession.

Revenge is a common motive with informers. But if revenge was Thomas' motive, the force and point of his vengeance depended upon the *truth* of his revelation. If he was narrating a fabrication, he knew that he was shooting a headless arrow, which could cause Dunton slight harm and small disquietude; he could only strike him by disclosing actual facts.

As to favor or the hope of reward having influenced the confession, that consideration is disposed of by the fact that it is proved by the defendant's own witnesses that Thomas had made substantially the same confession to his own associates, in private conversation, before he made his disclosures to the complainant, and when he could have no expectation of advantage in making them.

This testimony is, in substance, as follows:

One B. E. DUNHAM testified for the defendant, that he first met Thomas, March 17, 1873, (ten days after Thomas' testimony, and a month before Thomas' disclosure to the complainant) (fol. 847, p. 472). On *cross-examination*, he said that he heard Thomas' statement, which was given to the complainant; "heard it read after it was put down."

Q. Had you *previously* heard Thomas make the same statements in conversation?

A. I had—similar statements.

Q. How long before, if you remember?

A. He had talked to me about the business most every time I saw him.

The same fact is testified to by the defendant's witness, BRANDT (fol. 863, p. 480).

As to the second purpose for which the confession was introduced, that purpose is equally unaffected by any consideration of Thomas' good or bad char-

acter. A confession in the nature of a criminal confession generally pre-supposes a bad character in the party who makes it. It is not, in itself, evidence of the facts which it relates. To make it such, the maker must be placed upon the stand as a witness, and a party cannot offer as a witness a person whose testimony is itself an impeachment of his credibility, except in the cases of criminal prosecutions, where public policy allows a guilty party to turn State's evidence. But, as a fact, showing the source from which the information was obtained, by which a conspiracy was detected, and that the facts discovered conformed to the facts confessed, the confession had a value as a piece of circumstantial evidence of admitted weight, wholly independent of the character of the maker, for veracity, or the motives which induced him to confess.

1 Ph. on Evid,, m. pp. 555, 556, and notes 158, 159.
Duffy *v.* People, 26 N. Y, 588.

Second.—In consequence of the confession, the defendant's agent caused search to be made among the stationery stores in Boston, and discovered the shop of Mr. Gay, where Dunton bought the forged Exhibit.

TESTIMONY OF ILLFELDER.

"Q. Did you do anything in consequence of this conversation with said Thomas; and if so, what was it?

"A. Dr. Thomas did not return, as he promised; I therefore made use of Mr. Lincoln's recommendation of one Mr. Ahearne, a private dectective in Boston, and gave him instructions to find Thomas; but, as he had no time to attend to that himself, I preferred to give him orders in regard to these old English Herrick & Blunt pencils, to find out where such pencils were for sale, advising him that he may be able to find them in old stationery establishments

only; he so did go to work, as he reported to me, visiting all the stationery establishments along State street, and said that the only place where he could find them, was Gay & Co.'s place; I repeatedly sent him there to buy a few, so as to know whether he had seen the right kind of pencils, and returning, he told me that while he selected his pencils, they told him, in the way of conversation, that they had not sold any such pencils lately, except to one man, whom they knew as a writing teacher, whose name was Dunton, and who was very anxious at the time he bought these pencils to get some old stock; Mr. Ahearne's assistant, who could not find Thomas, I told Ahearne to employ to look up all stationery stores in Boston, and to continue the search, whether Dunton had looked for such pencils in any other place, or if he himself could find any more like Herrick & Blunt's pencils, and meanwhile left for New York (fol. 236, p. 133).

Third.—The Herrick & Blunt pencils were old pencils, out of the market; that Gay & Co. happened to have a few in stock was an unusual circumstance. Dunton made three visits at the store as a customer, of which calls, at least, one was before his trip to Camden.

Dunton himself testifies that after a long search among the stationers, Gay & Co. was the only place where Herrick & Blunt pencils can be found. (fol. 764, 765, pp. 427, 428).

One of the firm of Harper & Co., the oldest stationers in Boston, "judged the concern" (of Herrick & Blunt) "had not been in operation for at least twenty or twenty-five years," (fol. 132, p. 72.

EDWIN W. GAY testified:

"I think they" (the Herrick & Blunt pencils,) "are not to be found in the market, but do not know positively; have never searched for them; I know that at the time of my connection with my firm they were

considered old stock—dead stock. "(fol. 105, p. 56.)

Mr. Gay further testified: that "pretty near two months after the fire" (the Boston fire of November, 1872), Dunton called at his store and made a purchase of pencils; am very confident that he purchased one or more of the Herrick & Blunt pencils, and Faber's pencils," (fol. 104, p. 56.)

Q. Did he ever come in more than once?

A. He did.

Q. When else?

A. Once before, and once after, at least.

Q. How long before, and how long after?

A. I don't know how long, but it was a short time between each visit," (fol. 107, p. 58.)

Mr. S. S. GAY, the senior partner, testifies to the same effect:

Q. You have stated that Dunton was probably in three times; how long an interval was it between these three times?

A. To my recollection the second time was within a week or ten days from the first; the third time I am not definite.

Q. At which of the times was it that the sale of pencils was made to him, and that he took the piece of rubber as you have testified?

A. The second time, I should say, to the best of my knowledge, the third time he was in the store I did not serve him; what he purchased at that time I do not know, but to the best of my knowledge he was in the store *three* times.

Q. Was Edwin W. Gay, your partner, present when he purchased, as far as you know, the Rhodes & Sons, Herrick & Blunt pencils, as you have testified?

A. He was (fol. 136, p. 75).

Mr. Edwin W. Gay clearly identifies the interview when the particular sale of Herrick & Blunt pencils was made, as the second of Dunton's calls, because after Dunton left S. S. Gay told the witness who Dunton was, identifying by his former

call (fol. 105). He had been known to S. S. Gay many years (fol. 134), but then, for the first time, became known to E. W. Gay (fol. 105, p. 57).

Fourth.—It clearly appears that the second visit above referred to was a pure ruse of Dunton's invention, carefully prepared beforehand, to divert attention from his first call, on which last-mentioned occasion he, beyond doubt, got possession of the pencil which was manufactured into Exhibit E.

1. On the twentieth of January, 1873, Dunton returned from Camden with the forged exhibit in his possession.

On the boat from Camden to Boston he shared his stateroom with one Lorenzo J. Matthews, a conductor on the South Boston horse cars, whom he previously knew at Camden (fol. 687 701, pp. 384, 392), and showed him the exhibit, telling the uniform story he had fabricated in regard to it. Matthews testifies as follows :

"Q. Where did you go, on arriving in Boston on the 20th of February last?

"A. I came up to No. 2 Mason street and left my valise ; stopped there an hour or two ; and while I was sitting there Mr. Dunton came in to look after some things he had left there at the time of the big fire, and he asked me where I was going that day ; I told him nowhere in particular ; and he asked me if I wouldn't go and take a walk with him down to his office, and I did ; went down to his office and had dinner there with him there that day ; after dinner he said he was going out to look for a pencil of the same make as that he showed on the boat the night before ; we went out and went into several places—think into one or two places on Cornhill first, and down that way ; went up to Whittemore's on Washington street," etc., (places at which calls were made enumerated), "went down to Mr. Gay's and went in there, I stopping outside ; got

kind of tired waiting and opened the door to tell him I'd go back to where I roomed, and he said, just as I opened the door, 'I've found what I want, Matthews'; I stepped in then, and he bought some pencils, I don't know how many, two or three or four, and two or three pieces of rubber; * * * went back up to his office; I don't think we called at any other place." (Fol. 689, p. 385.)

"Q. Had you ever dined with Mr. Dunton before by his invitation?

"A. No, sir; I think not." (Fol. 701, p. 392.)

Q. Did Mr. Dunton lever the boat with you?

A. Yes, sir; he did.

Q. When did you part from him?

A. I left him out here at Tremont street; went down to Kenney's myself, to leave my valise.

* * * * * *

Q. Did you tell him you were going to Kenney's? (2 Mason street.)

A. I don't remember that I did; although I might have told him that I was going to lodge there while in Boston. (Fol. 693, p. 388.)

On the 28th of April, 1873, the witness made a written statement of his foregoing attendance on Dunton, for the purposes of this suit. (Fol. 702, p. 393.)

That was during the time for the defendant's testimony, and before the complainant had taken any testimony in rebuttal; and when there is no evidence that Dunton knew or could know, that the complainant had discovered Gay's store. The Messrs. Gay were not examined until June, following. (Fol. 103, 143.)

On the examination of E. W. Gay, Matthews was produced before the Examiner, and Mr. Gay was asked if Matthews was not present when Dunton purchased the Herrick & Blunt pencils.

Mr. GAY testified: Of course ours is a retail store, and we have a great many customers in at all times;

if there was anybody in company with him (Dunton) I don't know it.

Matthews was instructed at that time to refuse to disclose his name or residence, and did so refuse. (Fol. 108, 690; pp. 59, 386.)

The reason alleged by Dunton for the pretended search which finally brought him to Gay's, was, as given to Matthews, that by finding these pencils like that he showed me on the boat, he wanted to show that there were pencils of that kind manufactured as far back as 1854 or 1855.

His conduct on this search deserves attention.

He called on J. M. Whittemore. Mr. WHITTEMORE says: "He came in, as he always does, and asked me if I had any pencils like he showed me (identified as Exhibit E), or if I could tell him the name of the firm on the pencil. I could not tell him the name of the firm, but referred him to two or three other parties that I thought could give him the information that he wanted" (fol. 737, p. 412).

He called on J. L. Fairbanks & Co. HORACE G. TUCKER describes the interview:

"Mr. Dutton called into our store and showed me a piece of a lead pencil which he wished me to inform him if I had them or could tell him who did have them. He remarked at the time that Mr. Whittemore sent him in, thinking that I would know who had the pencil." (Pencil referred to was identified as exhibit E). "I told him at once whose pencil it was; that it was Rhodes & Sons, of London, imported by Herrick & Blunt, of New York. He wanted to know where he could find them; referred him to several firms; Hooper, Lewis & Co., and particularly Aaron R. Gay & Co. * * * He asked me how early I thought they were made. I forget precisely my reply; it was that they had been made a long time" (fols. 801, 802, pp. 448, 449).

He next called on Hooper, Lewis & Co. Mr. HOOPER describes the interview: "He wished to

know if we had any pencils like the one he had in his possession, which I made out from the mark to have been manufactured for Herrick & Blunt," (Exhibit E); "I told him we had not; he then wished to know if I could give him the date when the concern of Herrick & Blnnt was in operation; informed him twenty or twenty-five years; then Mr. Dunton asked me where I thought any such pencils could be obtained; referred him to Aaron R. Gay & Co., as being a place he could possibly find them" (fol. 132, p. 72-3).

Dunton himself says that Whittemore said "he didn't know the firm's name, but told me Mr. Fairbanks could tell. I went in there, and Mr. Tucker looked at it and said it was "Herrick & Blunt," the moment he took it in his hands" (fol. 765, p. 428).

At Gay's store, Matthews remained outside at first; Dunton went in, and the interview is thus described by Mr. GAY:

"The first time he came in (the witness meant "when he first came in," as this interview is clearly identified as the second call at Gay's (see fols. 136, 105), he asked for specimens of steel pens, then that led to questions of pencils; I showed him the different grades that were in the market, and one in particular I showed him was one that I thought I could recommend, a reporter's pencil; he took that pencil for one, and he took some samples of hexagon pencils, which I can't say were Faber's or Eagle's; then he referred to whether we had some old lots of pencils; I told him we had—we had the Rhodes & Son's pencils, also the Mears pencil, and as far as my knowledge he bought the Rhodes & Son's pencils—Herrick & Blunt; then he referred to the different rubbers there were in the market; I showed him our assortment of rubbers, which we called Diamond and Union-vulcanized rubbers; and to show him what the quality was and how it answered, I showed him a piece of rubber that I had carried in my pocket

two years, which was three-fourths of an inch wide by one and a half inches long; then he says. 'I want a piece of that rubber,' which he took out his knife, and cut through the middle. * * He gave no reasons for asking for a piece of that particular rubber." (fols. 134, 135, pp. 73, 74).

Mr. Gay also, at that interview, gave him a bit of an old rubber bottle, identified both by Mr. Gay and Dunton (fols. 142, 143, 765).

Mr. E. W. GAY, present at this interview, testified that Dunton gave as a reason for wanting old pencils, "that he had lost the collection of old pencils and such things by the fire; that he was trying to make a new collection" (fol. 104, p. 56).

Dunton's account of the interview does not substantially differ from the Messrs. Gay (fol. 765, p. 428).

On the return of Matthews and Dunton to the rooms of the latter, on the same day (Feb. 20th), Matthews remained some little time and then went home, Mr. Dunton saying "he had got to go up to a rubber store on School street" (fol. 700, p. 392).

Why he went to the rubber store is thus explained by the witness CHARLES W. HILL, who was present when he called on this occasion:

"I saw him" (Dunton) "at the store of H. A. Hall. He was directed to me by Mr. Hall. Well, he wanted me to examine a pencil he had" (identified as Exhibit E). * * "I examined it, and told him what I thought of it. He likewise showed me a piece of rubber gum that he had. He asked me the question if it was vulcanized the same as what was attached to the pencil" * * * "I told him it was vulcanized rubber, the same as what was attached to the pencil. As regards the rubber being vulcanized, Dunton asked how long it was since they had made it. I told him it was some twenty or twenty-three or four years since they commenced making it" (fol. 758, p. 424).

Dunton's ignorance of the name "Herrick," which he affected in his inquiries at Whittemore's and other places, was assumed. He was perfectly aware of the name, having, of course, learned it when he cut away all the letters except the final "K;" for on the *Sunday preceding* his return from Camden, he had *given the missing name correctly*, as is proved by the testimony of his own witness, Julia A. Harwood. She swears that, on the Sunday in question, Dunton visited her house and showed the pencil (Exhibit E) to herself and husband.

"x Q. How do you come to remember the letters "K" and "Blunt" as being on the pencil, and not remember the other letters? Was there anything especial to call your attention to these letters rather than the others?

"A. I heard them" (*i. e.*, her husband and Dunton, then present). "I heard Mr. Dunton say there was 'Herrick and Blunt' there once, and in sharpening the pencil he cut the letters all off but that 'K & Blunt'" (fol. 589, p. 329).

COMMENTS ON THIS EVIDENCE.

The course pursued by Dunton, and the cunning of the man, is by the foregoing evidence plainly revealed.

As the *second* call at Gay's store is plainly identified as having occurred the day of his return from Camden; his *first* call, a week or ten days previous, is unaccounted for. He neither attempts to deny or explain it. That call occurred before he went to Camden. Mr. Gay's store is a retail store employing clerks (fol. 108, 111). The complainant's theory, and it is a legitimate inference, is that he *then* quietly, and attracting as little attention as possible, bought what he judged to be old pencils, and thus obtained one or more of the Herrick & Blunt pencils from which he fabricated the Exhibit.

The visit to Gay's store with a witness, on the

day of his return from Camden, and the purchase of the Herrick & Blunt pencil on that day, is a transparent device to hide his tracks.

He was preparing evidence to clear himself if by any accident it should be discovered that he had bought a Rhodes & Sons pencil at Gay's store—a secret he did not confide to his confederate, Thomas. If such evidence should be produced, he argues, "I will be able to prove, by Matthews, that I got back from Camden on the 20th of February, and that it was on *that* day that I went to several stores to inquire for that kind of pencils, and it was on *that* day that I went to Gay's store and bought Herrick & Blunt pencils."

And such was his precaution, that he had Matthews make his statement, to be laid aside for use, as early as the 28th of April, more than a month before the Messrs. Gay were examined as witnesses, to prove his purchases. It will be observed that for no other purpose could Matthews have been taken by Dunton to dinner and asked to accompany him on an expedition, without interest or amusement to Matthews, except to render the latter available as a witness. And Matthews "who used to go in and out of Mr. Dunton's office then quite often," (fol. 702), was conveniently near when wanted.

The motives for his preliminary inquiries at other stores before he went to Gay's, is equally obvious.

He pretended not to know the name "Herrick"—a deception exposed by his own witness.

He went last to Gay's, where he knew he should find the pencils, so that he might appear to have been sent there. As Gay's, by common consent of the witnesses, was the place where old stock was most likely to be found, and as Dunton was accustomed to dealing with stationers—if his search had been genuine, he would have gone there first. He pretended to be seeking for pencils like the exhibit—partly to deceive and partly to assure himself before he actually put the pencil in evidence, that he should not be betrayed by proof that such pencils had not

been made at the date at which he wished to assign the exhibit. If he had really found the pencil at Mrs. Thomas', he could have had no doubt—for, if as he said, he left it there in 1855 or 1856—as he did not visit Mrs. Thomas' again for about twelve years thereafter—there could be no doubt about the age of the exhibit. So fearful was he on that point that he goes, by himself, the same day and inquires whether the vulcanized rubber in his fraudulent exhibit is of a kind that has been in the market long enough for his purpose.

It will be observed, also, that *his conduct at Gay's is different from that at any of the other stores which he visited.* At all the other places he at once produced the exhibit, Matthews going in with him, and asked about the Herrick & Blunt pencils. At Gay's he left Matthews outside. To have him present would not have answered, because Dunton did not intend to inquire for that kind of pencil, or to show the exhibit. To have done so would incur the risk of reminding some one of his former purchase. He, acordingly, entirely ignores the sole object of his search, as stated at the other stores; *does not show Exhibit E, or refer to it;* begins by asking for *pens;* gradually leads the subject to the question of old pencils, on the plausible pretense that he is duplicating a collection he had before the fire; does not even name the pencils he then had—which he would naturally have done, if he had had such a collection; buys a number of old articles, of different sorts, to divert attention, slipping in the purchase of the Herrick & Blunt pencils incidentally; is surprised just at the conclusion of his by-play, by Matthews, who becomes impatient at waiting so long outside on a cold day in February, ; says, "I've found what I want, Matthews," and concludes his purchases at once.

It would be difficult to find a stronger piece of circumstantial evidence than that against Dunton, afforded by his conduct on this occasion.

Fifth.—Dunton arrived in Camden on Saturday. The pencil was found by Mrs. Thomas on Monday. It was seen in Dunton's possession the intervening Sunday.

There is no dispute about Dunton's arrival at Camden on Saturday (fol. 763, p. 427).

Mrs. RACHEL B. THOMAS, who found the pencil in her drawer, testifies:

Q. What days of the week did he (Dunton) come and go away?

A. He arrived Saturday and left Tuesday.

Q. On which of the days was it, during his stay, that you found and gave to him the pencil (Exhibit E)?

A. Monday; Monday evening I gave it to him.

Q. Was there anybody present when you found it?

A. There was not.

Q. Do you remember when Mr. Dunton first asked you to look for it, or spoke of it at all on that visit?

A. I think it was Monday forenoon, but I cannot be positive whether it was in the forenoon, or after dinner (fol. 279, p. 157).

Mrs. BARBOUR, Mrs. Thomas' daughter, testifies:

A. He (Dunton) came on Saturday and left on Tuesday.

Q. Were you staying here at home, at the time?

A. I was.

Q. Did he say anything to you about a pencil having a rubber at one end and lead at the other?

A. He did not.

Q. How long had he been here before he spoke about it to your mother?

A. I don't know of his saying anything about it before Monday evening" (fol. 95, p. 51).

Dunton slept at Mrs. Thomas' Saturday, Sunday and Monday nights, and was at the house part of the daytime during that interval (fol. 280, p. 158).

He is skillful at *sleight of hand* (fol. 392, p. 221).

The drawer where the pencil was found was locked, but any common key would unlock it. It was unlocked by two ordinary pocket keys, tried at random (fol. 238, p. 134).

The house of Mrs. Thomas was a small country house, the rooms opening into each other, and there was "not a lock on the doors" (fol. 282, p. 159).

See diagram of house (fol. 266).

The witness, Mrs. Harwood, and one or two others saw the pencil in Dunton's possession, Sunday, at Camden (fol. 586, p. 327).

This point is fatal to Dunton's case. The displaying of the pencil on Sunday, although it would seem incautious on his part, was perfectly characteristic of the boastfulness and recklessness of the man. The making Mrs. Thomas find it was a mere matter of form, and having it in his pocket, he could not resist the temptation of displaying it. The stating that she had already found, and given it to him, which he knew would be true in a few hours, and to parties wholly unlikely to detect the fraud, was a kind of act which is not infrequent in persons engaged in such transactions. Moreover, before disclosing the fact that he had shown the pencil Sunday, when Mrs. Barbour's testimony made it necessary to his case to do so, he fancied that he had secured himself against detection by having suaded Mrs. Thomas to sign a card he had written, that it was Saturday he found the pencil, though he did not dare to call Mrs. Thomas as a witness. But this circumstance is fully explained by Mrs. Thomas on *cross-examination*.

"× Q. Have you not this Summer made this statement, in words or substance, "I have become convinced that I found and gave to Mr. Dunton the pencil eraser on Saturday?

"A. I have to this effect: Mr. Dunton wrote a few lines with a pencil and brought it to me, stating that it was Saturday night I gave him the pencil. I thought of some circumstances then and thought it

was Monday night. He told me no, it was Saturday night; and I finally signed the paper and he carried it to Mr. Thacher. The next day he came in and said: "You and Sarah were right, it was Monday night;" and he said he would go to Mr. Thacher and correct it" (fol. 281, p. 158).

Dunton tried every means to persuade the old lady to say she found the pencil Saturday, but without success (see fol. 282, 283, p. 159).

Rightly judging from the omission to recall Mrs. Thomas, on the part of the defendant, that she would not corroborate Dunton's story as to dates, the complainant put her upon the stand, and she disclosed the fact that it was not until Monday that the pencil had been imposed upon her.

There were but *three* witnesses to the alleged inquiry for and discovery of the pencil, Dunton, Mrs. Thomas and Mrs. Barbour; Dunton is directly contradicted as to the time of the occurrence and who were present, by both the other witnesses; the weight of evidence both direct and circumstantial is against him.

Sixth.—The other circumstances which appear from the evidence and increase the weight of proof against Dunton as to his fabrication of Exhibit E, are as follows:

1. Thomas said in describing his aiding Dunton in fabricating the pencil, that, to give the appearance of age, Exhibits E was discolored by rubbing it with inky fingers. The exhibit bears precisely that appearance.

2. Mrs. Thomas' house was in a remote and not easily accessible place, on a distant part of the coast of Maine; Dunton had been there prior to 1857, even on his own story, for the briefest time and on mere passing visits. From the Winter of '57–8, he he did not visit there for twelve years before that time; he was engaged in teaching at the numerous places mentioned by him in his testimony, in which

places he remained considerable periods and had temporary residences.

There was not the least probability that any such implement was to be found at Mrs. Thomas'. To go and search with the expectation of making the discovery, which Dunton alleges he made, was to the last degree inexplicable, and even absurd. Dunton going there to ask for a pencil, can only be explained because that house, from its remoteness, and because Mrs. Thomas and her daughter were its only inmates, was an especially eligible location for his proposed deception. It was the last place to be chosen as a spot in which to conduct a genuine search, and the first place as a spot in which to conduct a false one.

3. It was alleged that Dunton left a trunk at Mrs. Thomas' in 1856, and it might be presumed the pencil was in that trunk. But this theory is exploded by the fact that when Dunton went to Camden to find the pencil, he did not ask for or refer to the trunk, and no search was made in it. The trunk, if there was one, was ignored.

4. Why did Dunton *himself* go to Camden? Why not write Mrs. Thomas? His story is, that he went a long journey to Camden; asked Mrs. Thomas to look and see if she could find him a pencil with rubber on the end; made no suggestions as to where she should look; gave no description of the kind of pencil she should look for, beyond the bare request to look for pencils with rubber at the end. Mrs. Thomas shortly after stepped to the bureau drawer in her bedroom, and produced the pencil, and found it, according to Dunton's account, in his *absence!* Why could not Dunton have written from Boston "Mrs. Thomas, please look in your house and see if you find any pencils with rubber on the end, and if so, send them to me;" just as well as to travel several hundreds of miles in midwinter to say precisely the same thing, and then leave Mrs. Thomas to comply with his request in his absence? His *personal*

trip was utterly unnecessary for any genuine purpose. Its sole object was that he might have the opportunity to first conceal what he came to find.

5. Dunton displayed his pencil to a number of persons, unnecessarily telling them a story, the uniformity of which, and the ear-marking of which, by certain set phrases, such as that "he never looked for anything at Mrs. Thomas' but that he found it," is an ordinary badge of a story told for the purpose of making evidence.

He told the story to Whittemore, his publisher, who was thereupon called as a witness to testify to Dunton's declaration (fol. 737, p. 412).

To Harwood, his cousin, who was called in like manner (fol. 593, p. 331), and testified that Dunton "had a pencil there, that he showed me that he got over to Mrs. Thomas'; he said it was one he left there, he thought, in 1855 or 1856" (fol. 593).

To his brother, G. W. Dunton, who was called to testify that Dunton "said he found the pencil at Mrs. Thomas'; that he never called for anything there that she knew of, but what she'd hunt it up; said he must have left it there in 1855 or 1856" (fol. 613, p. 342).

To Wiley, his nephew, who was called to testify that Dunton said "he got it at Mrs. Thomas'; said he never asked for anything there yet but what he found" (fol. 623, p. 347).

To E. D. Dunton, his sister-in-law, who testified that Dunton "said he found it at Mrs. Thomas'; he said he never went there after anything but what he always found it; said it was the same one he had in 1855" (fol. 606, p. 339).

To Mrs. Harwood, his cousin's wife, who testified that Dunton said "that Mrs. Thomas found it for him; that he left it there in 1855 or 1856" (fol. 586, p. 327).

To Matthews (his witness for the pretended search among the stationers), who testified that he said "he found it at Mrs. Thomas'; that he had left it down East as long ago as 1855" (fol. 688, p. 384).

To White (whom he invited to share his state-room), who testified that Dunton said:

"He got it at Mr. or Mrs. Thomas', in Camden; I am not positive which. He said it had been at Mrs. Thomas' since 1855 or 1856" (fol. 548, p. 308).

After these witnesses had testified, Dunton resumed the stand, and testified that when Mrs Thomas gave him the pencil, "I remarked to her that I never saw a person like her; that I never inquired for anything in the house but what she had it" (fol. 764, p. 427).

He did not add the still more singular fact that it was necessary to come four hundred miles to make such inquiries personally, or they would be of no avail. Inquiries by letter would not prove so efficacious.

It is plain to see that this elaborate telling of the story to a number of persons—nearly all connected with him, and available as witnesses,—was simply for the purpose of making evidence. It is absurd to suppose that he would have made such uniform statements, and, especially, have brought in the alleged date, on every occasion, except for a purpose. No person would naturally have related, with the same particularity, to a number of people, a story of no interest to them, and which was elicited by no inquiries. Even if he had mentioned the bare fact, he would not, except to further the design he had in view, have volunteered, in every case, the same particulars.

6. Dunton was confessedly, both before and after the alleged discovery of the exhibit, engaged in making pencils like it, or having his assistants make pencils like it, at his room, for the purposes of this suit (fol. 624, 625, pp. 348, 349).

7. Dunton brought a pencil, precisely like Exhibit E, only made from a black pencil, to defendant's counsel in Boston, when he first produced Exhibit E. He asserted, in his evidence, that

Thomas had given him this second pencil at the door of his (Dunton's) rooms, at 16 Tremont street, and had said that it had been made in 1857.

Thomas was called as a witness to identify the pencil, but failed to date it back further than 1861. This pencil is known as Exhibit G. The story testified to, as to its discovery, was that it came from Augusta, Me.; that it was found in a box sent from there by express to Thomas; the box, like Dunton's trunk at Camden, contained writing materials formerly used by Thomas, and, among other articles, this pencil, made by Thomas from instructions received from Dunton when Thomas taught with him in 1857. The circumstances of the discovery in the box were told with great particularity, and the pencil put in evidence by the defendant (fols. 791, 792, 371, 372, pp. 443, 209, 210).

This story was proved to be a fabrification, from the fact that on the 20th of February—the day Dunton produced the Exhibit—the box in which it was alleged to have been discovered was in the express office in East Boston, unopened and undelivered. It remained there until Feb. 25, when a note was sent notifying the person to whom it was addressed—"S. E. Thomas"—to come and take it away; which was not done until nearly a week afterwards. These facts were proved by the notice itself, the books of the express company, and the expressmen who had possession of the box (testimony Johnson and two Holbrooks, pp. 160 to 166, and Complainant's Exhibit Holbrook No. 1, p. 167).

It thus appears that, at a time when Dunton and Thomas were companions, and engaged together in preparing evidence for this suit, and at a time when the manufacture of pencils with rubber at one end was confessedly going on at Dunton's rooms, Dunton brings forward and gives to defendants' counsel, together with the pencil which *he* will identify as coming from Camden, a pencil which, *Thomas*, his associate, will identify as coming from Augusta. Dunton and Thomas both told their stories, which

are essentially companion stories, on the stand. The proved falsity of the one, is no light circumstance in establishing the falsity of the other. Both pencils evidently came from the same workshop, and were part of a common scheme of deception.

8. Dunton is not a credible witness, and is a man of bad character.

He was convicted of larceny and sentenced to the Penitentiary, in Monroe County, in the State of New York, in October, 1861.

The record of his conviction is in evidence (page 143, Complainant's Exhibit X).

He connived to allow his wife to procure a fraudulent divorce, a piece of knavery he admits as follows:

"Another man seemed to think more of her than I did, and she more of him than she did of me; or, at least she pretended to; I kept away and allowed them to get a divorce, and helped them to it; in fact, I wanted to get out of it."

Q. How did you help them to it?

A. By letting them get their testimony and keeping away; by letting them get what they wanted to make out their case; I know that they couldn't have got a divorce if I had opposed it.

Q. Did you help them get their testimony, and if so, how?

A. I have answered as far on that as I care about (vol. 415, pp. 234, 235).

To a man capable of what Dunton here confesses, the fabrication of a piece of evidence like Exhibit E, would be a small matter.

He is a man who has always been provided with certificates to his character—all bearing marks of the same hand; he is, according to his own story, told under oath, violent and reckless, especially given to assaulting those with whom he deals, *e. g.*:

"Q. When had you last seen said Thomas, prior to the first time you met him last winter?

A. It was in the Winter of 1857, in Camden—yes, and knocked him down (fol. 773, p. 432).

Q. Do you recollect William M. Scribner?

A. I do; I saw him in Brooklyn, N. Y.; spring or summer of 1857 or 1858; * * he was a little distance off and I walked to him; I told him he continued his slander, and I knocked him down" (fol. 762).

A falling-out between himself and his confederate, Thomas, is thus described:

"I told him to leave; he did not move quite as quick as I wanted him to, and I moved him with my boot; kicked him about ten times, as nearly as I can recollect * * I kicked him clear out-doors, down three flights of stairs" (fol. 772, p. 432).

Dunton was at this time sixty years of age (fol. 391), and a shade of improbability attaches to this account of his great activity.

The foregoing extracts, all from the defendant's testimony, are sufficient to illustrate the witness' manner and characteristics. Add to all this that Dunton has an interest in the controversy which, whatever it may be, is obviously coincident with the defendant's. This appears not only from his intervention in the suit, in which, by his action and conduct, he assumes the character of a party, but by his own admissions.

As to the first point, it appears that he personally attended during the taking of the testimony, when his own evidence was not needed (fol. 241, p. 136, 417, p. 235); that of seventy-one witnesses, in all examined by the defendant, sixty-four were called to speak to the controversy concerning his pencils, of whom a large number showed by their evidence that they had been procured by Dunton or were taken from his relatives and connections; and that such was his activity on the defendant's behalf, that by one of the witnesses, at least, he was believed to be one of the parties to the suit (fol. 463, p. 261).

The second point appears from the following evidence:

Mr. GEO. W. WHITE, one of the defendant's

witnesses, testifies as follows, in regard to a conversation between himself and Dunton, had some *two weeks* before Dunton had been called as a witness:

"Q. Did you suppose Mr. Dunton was one of the parties to the suit?

A. I did not know what interest he might have. He informed me that *he had an interest* in the matter, and had manufactured that style of pencil before the patent right had been taken out." (Fol. 548, p. 308).

It amply appears that Dunton is a witness utterly without credit.

The direct and circumstantial proof that has been narrated establish the proposition, that the implement, Exhibit E, was fabricated, and the story of its alleged discovery untrue.

II.—Testimony as to the alleged use by Dunton of pencils like exhibit E. prior to January 9th, 1857, the date of Lipman's application.

DEFENDANT'S TESTIMONY.

1. Dunton's own testimony on this point is vague, and consists in the general statement that he first made such articles in 1852, and used them from time to time afterwards.

The consideration of his testimony and credibility, already had, renders it unnecessary to cite further extracts.

2. LAVINIA PENDLETON, testified that she remembered the circumstance that twenty-one years before, Dunton had made one of his pencils in her presence, by splitting it open and picking out the lead and tying it up with a bit of white thread; that she subsequently saw him at his writing-room use similar pencils, but "never examined one afterward."

The accuracy and truthfulness of this witness, and the probability of her remembering for twenty-one years so trivial an incident, may be seen from the following extracts from her testimony :

She testifies that, on the occasion referred to, viz., May, 1852, "I said to him (Dunton), 'What do you intend to do with a pencil like that?'; he said it was to erase with ; that he had made them in New Orleans, and knew the use of them," (fol. 330, p. 186.)

But it appears from Dunton's own testimony that he never thought of such pencils—much less knew the use of them—before "the Spring of 1852," at that very time, and, indeed, he came so near fixing the date *after* the alleged occasion to which Mrs. Pendleton was referring that it was necessary to prevent him from tripping by the following suggestive question put to him, upon his direct examintion :

"You have said that you conceived the idea of making a pencil-eraser like Exhibit E, from seeing a pencil which had been split," etc.

"State how long, to the best of your recollection, that was *before* you made the said pencil-eraser in May, 1852, at the house of Mrs. Pendleton?

A. It was not long before ; I can't say ; not far from the same time ; a short time previous" (fol. 380, p. 214, 215).

He never visited New Orleans but once, which was in 1843, nine years before, and it is not credible, therefore, that he could have in at least one important particular, have made the statement Mrs. Pendleton puts into his mouth.

Witness has known Dunton since about 1825 ; Swears in answer to the question whether Dunton is a connection of hers "He is not" — which was either directly untrue or evasive ; Dunton was her son-in-law, though at the time separated from his wife by the fraudulent divorce already mentioned. She says she fixes the date of May, 1852, as the date

of Dunton's visit, by the publication of some copy-books and some letters "written at that same time"

Q. When did you last see these letters?

A. Last Saturday.

Q. How many of them are there, and who are they from?

A. Only one goes to fix the date, and it was from my husband.

Q. What was there in those letters which fixes the date of Mr. Dunton's visit, and his making the pencil?

A. Nothing at all.

Q. What was there in those letters which fixes the date of that visit?

A. That is my particular business. I shall decline to answer anything further, as it has nothing to do with this affair" (fol. 335, p. 189).

What weight can be given to a witness called to testify to a matter of which the *date* is the all essential part, who thus refuses a perfectly proper cross-examination as to the very crucial point of her whole story?

Her daughter, Mrs. OCTAVIA O. SPRAGUE, who had been present during her mother's examination, immediately succeeded her, and told the same story.

She says that she subsequently saw Dunton use similar pencils, but does not fix the date. Her memory is a blank as to the transaction, except so far as the precise points her mother has just testified to in her presence, as witness the following:

"Q. What particular interest had this pencil for you at that time?

A. None, at all.

Q. Do you remember anything else that happened in May, 1852? If so, please state it.

A. I do not, anything particular.

Q. Do you remember anything else that was talked of, on the occasion when you saw the pencil?

A. No; only that he spoke of his writing at New

Orleans, and *making those same pencils*, only in a better manner."

It will be noted that the witness follows her mother's evidence so clearly that she falls into the same dilemma concerning the statements respecting the alleged use of the pencils at New Orleans.

"Q. Do you recollect when you first saw any other implement for writing and drawing there" (at Dunton's rooms) "and particularly when you first saw it?

A. Nothing only this rubber pencil when he made it, in particular.

Q. Since the time when this rubber pencil was made, have you had occasion to think of it before the matter of this suit came up?

A. No" (fol. 348, p. 196).

Now, the evidence of these, the mother-in-law and sister-in-law of Dunton, is utterly without weight. It is simply incredible that they should remember so trivial a circumstance with the particularity they assert, after an interval of twenty-one years. The witnesses admit that they both talked with Dunton before giving their testimony (f. 348, 339). Their story was, doubtless, his suggestion, and they were made to fancy they remembered it, or some actual circumstance of a more recent date was transported to an earlier period.

That they can speak with such particularity as to the alleged circumstance that a pencil was tied with a thread, and the thread was white, after a lapse of twenty-one years, having had no occasion to call the circumstance to mind in the interval, and while they can remember no other kindred circumstance of the same date with the same particularity, plainly shows that they speak of what they have been persuaded, rather than what they recollect. The colors on their mind are too fresh for an old impression; if the mental photograph were

really twenty-one years, instead of twenty-one hours' old, its distinctness would have faded.

RACHEL B. THOMAS, Dunton's aunt by marriage, a lady seventy years of age, already mentioned as the witness duped into finding the fabricated pencil. Her testimony is briefly to the effect that she remembered the use by Dunton of the same or a similar pencil, at her house, during his visit some sixteen years before, and that she remembered laying the pencil away at that time, in the box, where she finally found it.

A very brief consideration must lead to the conclusion, that in this the witness was mistaken, as she easily might be.

1. The visit of Dunton to her house, when she fancies she saw him use pencils like Exhibit E, occurred in the Winter of 1857, nearly a year after Lipman's invention.

Dunton paid two visits to Camden; he spent Thanksgiving Day at Mrs. Thomas' house, in November, 1856; he was also there engaged in teaching in the Winter of 1857–8, and was not there again ior twelve years (fol. 426, Cross-Q. 6 & 7). This date is proved by his advertisements in the Rockland papers, as well as by other evidence, and though at first denied by Dunton, is now admitted (fols. 267, 268, 269, pp. 151-2; advertisement dated "January 27, 1858," p. 152). He was at that time engaged in teaching, as the said advertiiements show.

Mrs. Thomas said that Dunton was at her house on Thanksgiving 1855, when Mrs. Barbour (her daughter) and Capt. Barbour, the husband of the latter were present, but this is clearly proved to be a mistake of a year; it was the following year, 1856, that the Thanksgiving meeting occurred, as clearly appears by the following testimony of Mrs. BARBOUR:

"Q. In what month and year were you married?
A. The 20th of August, 1855.

Q. Did your husband afterwards go on a voyage to Constantinople, and when.

A. He did, he sailed from Boston on the 1st of November following.

Q. When did he return from that voyage?

A. He returned the next Spring. He was gone about six months from home.

Q. Where did you spend Thanksgiving in the year 1855?

A. Here at my father's.

Q. Where did you spend Thanksgiving 1856?

A. At home, here.

Q. Who were here on Thansgiving, 1856?

A. Mr. Dunton and his wife, and all the family except one brother. * * * *

Q. When did you next see Mr. Dunton here?

A. Next Fall, 1857. * * * * *

Q. Who was at your Thanksgiving in 1855?

A. I don't think we had any Thanksgiving, any more than our own family.

Q. Was Mr. Dunton here during the year 1855, to your recollection?

A. Not to my knowledge" (fol. 94, 95, 96, pp. 50, 51).

Mrs. Thomas says that she has no recollection of seeing Dunton at her house prior to the year of the Thanksgiving meeting which she erroneously supposed to be 1855; but which it has just been shown was 1856. When asked if Dunton was there prior to that time, she says, "I don't think that he was; I have no recollection of it" (fol. 425, p. 240).

Thus, the only visits recollected by this witness or Mrs. Barbour occurred in 1856, and in 1857–8.

Dunton introduced much evidence to prove that he also made a visit in 1855; the witnesses on this point are entirely mistaken, as might be easily proved by a comparison of the testimony, but the point is wholly immaterial; if Dunton paid any such visit, he was only absent from Massachusetts, where he

then had his headquarters, by his own statement, about a week, viz.:

"Q. How long were you absent in Maine?" (referring to alleged visit of 1855.

A. I think about—not far from a week.

Q. Did you leave Newburyport for Maine, and return to Newburyport?

A. As near as my recollection serves me, I came from Portland to Newburyport; whether I went that way or not, I am not able to say, or whether I went from Boston" (fol. 781, p. 437).

This time would scarcely allow him a day at Camden, and Mrs. Thomas, even if he made the visit, has no recollection of seeing him at her hosue or of seeing him use pencils.

She fixes the time when she thinks she saw him use a pencil with rubber in the end, as the time when he was teaching.

"Q. While Mr. Dunton was there" (at witness' house) "was he engaged in any work or occupation? If so, state what?

A. He was teaching at the Institutes, I think, at the time; I think in 1855 or 1856; teaching pen, manship" (fol. 422, p. 238).

The date of the teaching is already shown to have been 1857—to which period, making the mistake of a year, witness refers. Witness continues:

"Q. Did you see him do any work at your house? and, if so, what was it?

A. Writing and drawing. * * *

Q. What did he do it with?

A. With pencil; pencil with a lead at one end and rubber at the other" (fol. 422, p. 238).

It thus plainly appears that the occasion when Mrs. Thomas thinks she remembers seeing Dunton use a pencil like Exhibit E, was the Winter of 1857-8, when Dunton was engaged in teaching, and which

was nearly a year after the date of Lipman's application.

2. The witness' fancied recollection that she put Exhibit E, sixteen years before, in the box where she found it, arises solely from the fact that she found it in a box to which no one habitually had access but herself. The circumstantial evidence already detailed shows that, in this respect, she must be mistaken; and that the exhibit was placed there by Dunton, and not by herself. This conclusion is corroborated by this further consideration: If, as she supposed, she remembered putting the pencil in the box in 1857, the box being one which held similar articles, and to which she had had constant resort during the whole intervening sixteen years, as occasion required, articles "being placed in the box from time to time," and "taken from the box from time to time" (fol. 426) she would, on inquiry being made, and her attention being called to the subject, have remembered that the pencil was in the box, and have said so, and produced it therefrom. But when Dunton wrote to her and asked her to look in his trunk, and when he came to Camden and asked her to look for a similar pencil—she didn't remember that she had it, but had to search for one (fol. 423, p. 239). She didn't remember putting it in the box until she *found* it there. It was the latter circumstance alone that impressed her with that belief.

3. The *cross-examination* of Mrs. THOMAS affords a fair illustration of how utterly impossible it is for a witness to speak from memory as to the character of an implement casually seen in the hands of another so many years before; and, on this point well shows the untrustworthy character of all evidence of that sort.

(The witness was shown a number of exhibits of pencils having rubber at the end, as well as ordinary pencils, being the same or similar to them; said to

have been used by Dunton, with the following result :)

"Q. Did he use an implement like Exhibit D, now shown you ?

A. I don't know that I ever saw one in our house before.

Q. Did he use one like Exhibit P, now shown you ?

A. I never saw one like it, to my knowledge.

Q. Did he use one like Exhibit K, now shown you ?

A. I never saw him use any like it.

Q. Or like Exhibit H, now shown you ?

A. No ; I never saw any, to my knowledge, like any of them.

Q. How about complainant's Exhibit J, now shown you ?

A. I don't know that I ever saw Mr. Dunton have one in his possession.

Q. How as to Exhibit G, now show you (the other forged Exhibit, precisely like Exhibit E).

A. I never noticed any in his possession like it (fol. 428, 429, p. 242).

It is readily seen that the testimony of this witness goes for nothing in proving the use of pencils like Exhibit E, prior to 1857.

CHAS. A. EVANS. This witness testifies to his alleged remembrance of a trivial incident, said to have happened eighteen years before, when Dunton was in the witness' engraving shop, and left behind him, according to the story, a pencil like the fabricated Exhibit E, which is always made the standard of comparison.

What possible reliance can be placed upon the accuracy of such a statement, weighed against the simple impossibility of the witness remembering an incident of such a character such a length of time ?

The evidence discloses when the witness was persuaded of the story.

Evans was one of the gang of idlers who frequented Dunton's rooms, from which Dunton, as their chief, selected nearly all his witnesses.

E. G. WILEY, who lived at the rooms, testified:

"Q. How often was he (Evans) at the rooms?

A. He was there frequently; most every day; that is, for some little time (fol. 636, p. 355.) And it appears that this "little time" was just the time when Dunton was busy in making evidence for this case" (fol. 619, p. 346).

EVANS admits on *cross-examination:*

Q. How often were you in Mr. Dunton's rooms, in School street, in 1871?

A. A great number of times, (fol. 359, p. 202).

Q. Who first asked you to testify in this cause?

A. I was at Mr. Dunton's room; that was in February; the last of February; he asked me if I remembered his using a pencil with rubber in the end; I told him where I see him use it.

Q. Did he remind you of the occasion when he left his pencil behind him?

A. He did not; he told me the time he thought it was, and I told him I thought it was earlier; I told him I could tell just the time. * *

Q. What was the occasion of your going to Mr. Dunton's rooms in February last? A. Nothing particular brought me there; I'd been in and out frequently at his office.

Q. You had no business there on the occasion you called?

A Well, only a friendly visit, that's all (fol. 360, p. 203).

The witness alleges that he fixes the date which was thus arranged between Dunton and himself, by an entry in an account book. For notwithstanding Dunton's desire, above set forth, to fix a later date, when he came to testify he remembered the matter precisely as Evans did, date and all (fol. 384, p. 217).

This entry of August 11, 1855, in a small account book is an evident interpolation, made at some time or other, for it appears in a blank space, out of chronological order with the other entries in the book, and the witness thus betrays his sensitiveness on the point on *cross-examination.*

"Q. Was that entry, as matter of fact, made over an erasure?" (It will be observed witness is asked as to the date when the entry was made.)

"A. That entry was made at the date it says. (Question repeated.) I don't understand the question, * * * (fol. 752, p. 421.)

This evidence is not worthy further consideration.

SILAS C. THOMAS was called to prove the use by Dunton, of pencils like Exhibit E, in Camden, in 1855. As the defendant afterwards produced volumes of testimony to impeach the veracity of this, his own witness, and especially proved that the date of the occurrences at Camden had been put back one year by Thomas' own falsification, thereby imposing upon Dunton's simplicity, it is unnecessary to analyze the testimony of a witness, so abundantly proved to be unworthy of credit. It may however be well in passing, to note the fact that Thomas' alleged bad character was known to Dunton as well *before* he produced him upon the stand, as *afterwards.*

Dunton swears that Thomas raised an expense bill and collected $1.80 upon it, from Mr. Thacher, the defendant's counsel, by adding the 1, before the 80. He says: "I" (Dunton) "mentioned it to Mr. Thacher as being a dishonest trick, and I hadn't any confidence in the man. I also told him that I didn't believe that he sent for the box; Subsequently I told him that. He said he did, and he could prove it, and furthermore he could prove that the pencil was made in 1857" (fol. 792, p. 443.)

As Thomas swore upon the stand that the pencil was made in 1861, all this must have occurred *before* he gave his testimony, and shows that Dunton by

his own confession believed Thomas to be falsifying when he produced him as a witness; and, as he had been intimately acquainted with Thomas, his wife's cousin, for many years, it requires no confession to prove that, if Thomas was in reality, the habitual criminal Dunton now asserts him to have been, that fact was as well known to Dunton when he called upon him to testify, as afterwards.

Benjamin F. Lord was called to testify that twenty-one years before, going accidentally into Dunton's rooms, he saw him using, on a large chart upon which he was engaged, a pencil like the standard Exhibit E. This is another of those isolated cases of impossible recollection, which form the disjointed props to Dunton's story. The utter inaccuracy of the witness' memory (who was ill when his evidence was given) may be judged by a single instance. He identifies Exhibit E as the pencil he saw Dunton using on the large chart—having letters "four to six inches long" (fol. 436, p. 246). Dunton himself testifies: "I used only Exhibits D and I in preparing charts, and *not* Exhibit E" (fol. 379, p. 214). Exhibits D and I were very different implements from Exhibit E, and this fact alone deprives the witness' testimony of any value. The illness of the witness prevented the carrying the cross-examination beyond the exposure of the foregoing proof of the untrustworthy character of his memory; nor was it necessary to pursue it further in relation to such slight and uncertain evidence as was given on the direct.

Charles French, a writing teacher and hotel keeper, an old partisan of Dunton, remembers seeing Dunton use pencils like Exhibit E, when he (French) kept a writing school at No. 94 Tremont street. Cannot state when he first saw Dunton use them, but after much pressing is able to carry the date back of 1857.

The examination of the witness shows that his memory of dates is entirely uncertain, and affords

no proof whatever, that. if he ever saw Dunton use any implements like Exhibit E, at all, the time when he saw them was before 1857.

He says that he saw Dunton use the pencils at 94 Tremont street, Boston, during his (the witness') occupation of the rooms as a writing teacher.

It appeared on cross-examination that he was twice in occupancy of the rooms 94 Tremont street. Once for a period which began in 1852 and ended in April, 1857, and afterwards, from a period which apparently began about 1858 and continued an indefinite period.

Now the witness, an associate and partisan of Dunton, pretends to say that he remembers Dunton coming to his rooms and using, incidentally, these pencils prior to 1857; how accurate is his memory of that fact, andof the dates he endeavors to fix, will appear from the following extracts from his testimony:

"Q. During what period was it that you saw Mr. Dunton have and use said pencil-erasers similar to Exhibit E?

A. I *can't remember* the date of first seeing them used, but it was between the years of 1850 and 1858, during my occupancy of rooms No. 94 Tremont street.

Q. How long was it after you went to No. 94 Tremont street, as you have stated, that Mr. Dunton commenced using said pencil-erasers at your rooms there?

A. I can't state the first time I ever saw him use them; I simply remember the fact of seeing him use them during the occupancy of these rooms (fol. 443).

Considering the fact that, with a short interruption, the occupancy of the rooms 94 Tremont street, by the witness, continued for an indefinite time *after* 1857, as well as before, such general recollection is no proof that he saw the pencils used prior to 1857.

The witness further says:

"I have carried on the business" (of teaching writing) "since the latter part of 1849; first at 111 Washington street, in connection with Payson & Dunton; in 1850, I think it was, I dissolved my connection with them and opened a school at 94 Tremont street." * * * * "He" (Dunton) "was in the habit of visiting my rooms almost daily while I was at 111 Washington street, and at 94 Tremont street; the visits at 94 Tremont street commenced on my first occupancy of the rooms, which I think was in 1850," (fols. 442, 443, pp. 249, 250).

Dunton testifies that he left Boston and went to Maine "in the latter part of 1849 or 1850," and remained in Maine "till the Spring of 1852" (fol. 405 p. 229).

So that at the time of Dunton's "almost daily" visits he was not in the City of Boston, but residing in the State of Maine. The Dunton referred to, of Payson & Dunton, is a brother of A. R. Dunton, between whom and A. R. Dunton there has been a feud, as appears from the evidence, lasting from at or before the period inquired of until the present time, (fols. 450, 408). The brother is characterized by one of the defendant's witnesses as "a miserable scoundrel," (fol. 672 p. 376).

The witness further says:

"Q. What were you doing in the year 1858?

"A. I was then carrying on what was known as the Montgomery House.

"Q. In the month of June, 1858, were you not the principal of French's Commercial College?

"A. I don't remember that I was teaching at all at that time."

It appears from the certificate read by the witness at fol. 451, that he was teaching as principal of the Commercial College inquired of at 289 Washington street, June 22, 1858.

Such glaring errors in dates and years as are ex-

posed by the discrepancies in the foregoing evidence, indicate an infirmity of memory on the part of the witness which renders his statements as to the time he fancies he remembers, or tries to remember Dunton's use of pencils like Exhibit E, utterly untrustworthy.

This infirmity of memory is still more strikingly illustrated by the fact that it afterwards appeared by certificates and other documents, that the witness never taught at 111 Washington street at all, and that he remained at 94 Tremont street, on his first occupancy of the rooms, as late as April 1857 (fol. 454-462)

The bias of the witness in favor of Dunton, for whom he appears to have been a constant certifier and intimate for many years (fol. 442, 451, 454), tends still further to weaken his evidence. That evidence, certainly, cannot be accepted as sufficient proof that Dunton was ever seen by Mr. French using a pencil like Exhibit E. prior to January 19, 1857.

MR. SAWYER who occupied the rooms *after* 1857 says he then saw Dunton use such pencils, but as his testimony relates to a period after Lipman's invention, it is unnecessary to point out the many discrepancies which it contains.

The only remaining witness who testifies to the alleged use by Dunton of pencils like Exhibit E. prior to 1857 is one JAMES SUMNER. The witness is another of Dunton's associates, and one of the same party that frequented his rooms.

The witness says:

"I have known him "(Dunton)" intimately since the Spring of 1853." (fol 494).

Q. Where was your office, when you had one, in Boston?

A. At 34 School Street, Boston, my last office.

Q. Had Mr. Dunton his writing-rooms there at any time you had your office there?

A. He did; I think he left there in the Spring, about a year ago"—— (fol. 503, p. 283).

The witness, of course, remembers seeing Mr. Dunton use pencils like Exhibit E "in 1853;" he also remembers that he used at or before that period to make similar pencils himself, and to stick a piece of lead in one end of a grapevine, and a bit of rubber in the other to serve as a rude implement of the same sort. He makes models from memory, for the use of this suit, of the implements he refers to. He states that others were present and witnessed the same things he himself relates, but no such witnesses are produced, and his evidence stands uncorroborated.

Testimony of this sort is insufficient to defeat a patent. Where implements are reproduced from memory only, and alleged to have existed twenty years before, such unsupported recollection, as to a subject-matter of the sort is too weak to be relied upon. Especially is this so, where the witness has a strong bias, is produced from a suspicious source, has untrustworthy associations, and is, as in this instance, directly impeached as to his credibility. Mr. Philarmon Ruggles, an aged farmer, whose credit is in no way attacked, testifies that he had known the witness "ever since he was a boy," and has lived at Milton, witness' residence, for thirty years, and that "as to his general reputation, so far as my knowledge is concerned, is very bad for truth and veracity" (fol. 146, p. 81).

J. WALTER BRADLEE testifies, that he is a resident of the same town, has known "James Sumner, here present, ever since I was a boy."

Q. Do you know what his character is for truth and veracity among his neighbors, and those among whom he has lived; and if yea, please state what it is?

A. Bad" (fol. 155).

JOHN MEYERS testifies that he has known Sumner for twenty-five years, and resides at Milton.

"Q. What is his general character among his neighbors and townsmen, as to truth and veracity?

A. In my neighborhood it is bad."

The only way in which this testimony is met is by the production of a number of witnesses, in effect that they live at Milton and never heard anything about the witness' character for truth and veracity —a sort of testimony which any obscure person might obtain to an unlimited extent.

It is sufficient that Sumner's testimony, relating to a fact testified to by no one except Dunton and himself, is without weight in the absence of stronger corroboration.

The witnesses whose testimony has been commented upon above, are the only witnesses in the case testifying to the use by the defendant of pencils like Exhibit E prior to 1857.

Some other testimony was, at a subsequent stage of the case, sought to be introduced by Dunton, but was stricken out by the Court below, and no appeal taken from the order; the order striking out appears at fol. 903, p. 502. The parts of depositions thus stricken out are as follows: Present record—

Martin V. A. Tower (Int. 11, fol. 534, p. 300, to end of deposition, fol. 538, p. 303).

Warner C. Tower (Int. 11 to 13, p. 313).

Martin W. Tower (Int. 21, fol. 562, p. 315 to end of deposition, fol. 585, p. 327).

Francis M. Tower (Int. 10, fol. 600, p. 335 to end of deposition, fol. 605, p. 338).

Daniel O. Quimby (whole deposition, Except-Int. and answers, 1 to 7, 16 and 17, cr. Int. 1 to 12, 27 to 41, pp. 395 *et. seq*).

George H. Bundy (whole deposition, exc. int. 1 to 7, p. 406).

William H. Norton (whole deposition, p. 371).

James H. White (whole deposition, p. 400).

Ambrose Herriman (whole deposition, p. 450).

The order striking out was made at the hearing below, and none of the foregoing depositions will, therefore, be considered.

Against the evidence of Dunton and his witnesses, the complainant produced the testimony of the persons most likely to have observed his use of pencils like Exhibit E, prior to 1857, if such had really been the fact, who directly contradicted his story.

JOSEPH P. WATERHOUSE testified that he taught penmanship for him in 1853, longer than two or three months," (fol. 122, 799) "as I was connected with him in teaching, being interested in both writing and drawing, I naturally was very attentive to what he might write or draw, and also would naturally notice the implements that he used.

Q. During the period referred to, did you ever see Mr. Dunton use, or have in his possession, a pencil-eraser consisting of a wooden pencil with lead at one end, in the ordinary manner, and rubber inserted in the place of the lead at the other end?

A. I have no recollection of seeing him use such an implement; had he used such an implement I think I should have been likely to have noticed it." (fol. 122, 123, p. 67).

Witness further testified that he had been invited to Dunton's rooms, in February, before Dunton's testimony, where Dunton showed him pencils with rubber in the end; said "they had not been made far enough back to do him any good in this case; that he was about going down to Camden, Maine, to see if he had not left a pencil of the description which he wanted previously to 1856; he asked me if I couldn't remember his having used them in his school when I was with him in 1853," and became very indignant when witness said he could not remember. About a week after, "he asked me over again if I could not remember of his having used the pencil when I was with him; "I said I could not;" * * he said that "he would not begrudge fifty dollars if I could" (fol. 123, 124, 125, pp. 67, 68).

This witness is entirely unimpeached, and was subsequently called by the defendant as to other matters, (fol. 799,) and Dunton was again called, after the testimony of Mr. Waterhouse had been taken,

but did not contradict, in any particular, the account above given of the conversation between them.

MR. LYMAN B. HANAFORD, principal of Public School No. 22, Brooklyn, N. Y., for ten years, and a life-long teacher, testifies: That he assisted Dunton, teaching bookkeeping at his school in the Summer of 1853 (fol. 177), that he was "employed as assistant teacher in Mr. French's (the defendant's witness) school, from the Autumn of 1853, I think, until near the 1st of May, 1855;" he continues, "I gave lessons in bookkeeping in Mr. Baker's school in Chapman Hall while I was employed at French's, between the hours of twelve to one; from the 1st of May, 1855, for several years after, together with Mr. J. W. Payson, we carried on the Mercantile Academy, in Winter street, until January 1, 1856; then in Summer street, for perhaps, about five years; I am also employed at Conver's before I went with Dunton in Summer street" (fol. 178); all this was at Boston, and during the time, when, according to Dunton's story, he was making ostentatious use of the pencils like Exhibit E, in the writing schools and similar places. The witness states that during the period in question he saw Dunton; "he was in the habit of circulating in all these places;" he saw him write or draw "frequently;" he was always at it when he could get a pen.

"Q. Have you any recollection of having seen him have or use an implement like defendant's Exhibit E, now shown you?

A. No, sir.

Q. What were your opportunities for observation, in case Mr. Dunton had used the implements inquired of in your presence?

A. I had every opportunity, and many reasons for doing so" (fols. 179, 180, p. 101).

WILLIAM M. SCRIBNER, author and book-agent, residing at Chicago; was in partnership with Dunton, from February, 1848, until July, 1854.

Q. During the time you were in partnership with Mr. Dunton, did you live together?

A. Yes sir.

Q. During the time that you were in partnership, and living together, did he use, for writing, a pencil or pencils, having lead at one end and rubber inserted at the other.

A. Never.

Q. Please look at defendant's Exhibit, E., and state whether during the time you and Dunton lived together, he used pencils like that—that is with lead at one end, and rubber at the other.

A. Never (fol. 223-4-5, pp. 126-7).

The testimony introduced by the defendant to rebut that which was given to contradict the story of Dunton, and his witnesses, does not require particular consideration.

The mass of it is hearsay and irrelevant, or consists of mere denials by Dunton, or reaffirmations by him of his original story, which in no way strengthen it, or tend to explain its inconsistencies. Dunton produces the whole society of his companions who inhabit his rooms where he manufactured his Exhibits, and each has a long story to tell, generally to the effect that the defendant's witness, Thomas, stated that he was to receive large sums of money for assisting the complainant, or that the narrator had heard that some other person in the complainant's employ was prepared to offer large inducements for testimony, no part of which evidence was brought into the remotest connection with the complainant or any witness produced by the complainant, and which had no bearing upon any of the points in issue or the credibility even, of any of the complainant's testimony. So far as any of these stories could be turned to convey the slightest inference against the complainant's agent Mr. Illfelder, it was met by the most explicit and direct contradiction (fol. 299 *et seq.* 303 *et seq*).

DUNTON'S INSANITY

To re-establish Dunton's credibility, the defense of *insanity* has been interposed. So far as

medical evidence is concerned, this allegation rests upon the opinion of one Dr. Chas. Sumner, of Rochester, N. Y., who testifies that he attended Dunton about "three weeks" in the Fall of 1861, and saw him "perhaps five or six times;" "found him, as near as I can remember, very weak in body and mind—more particularly in mind. He seemed rather indifferent to matters and things in general—not able to collect his ideas very readily. He answered questions put to him very slowly and in rather an indifferent manner. There was rather more than ordinary heat in his head. He had cold feet and hands; he was suffering very much from indigestion and constipation. I found him lying in bed.

"Q. Please state what the nature of Mr. Dunton's disease was?

A. I pronounced it a form of insanity—what we term dementia.

x Q. Have you had any experience in the treatment of the insane at hospitals or institutions devoted to that purpose?

A. No, sir; I have not.

Q. Have you had any other experience or observation of insanity, except as it has appeared as an incident of the diseases you have been called upon to treat?

A. No.

Q. From what facts in the case of A. R. Dunton, mentioned in your direct examination, did you form the opinion that it was a case of dementia?

A. I formed my opinion from the facts stated in my answer to the third direct interrogatory on my direct examination," quoted above (fols. 822, 823, 824, pp. 459, 460).

The witness further regards "dementia" as curable "in the acute form;" cannot recollect the names of any authors on insanity. Brown-Sequard "stands high with some; I don't know much about that, having never perused it." Thinks Dunton's was not a case of "emotional insanity" (pp. 459–61–62).

This evidence is supplemented by the following:

"It was generally supposed that he was not morally responsible for what he did at Brockport.

Q. Why?

A. He was considered rather erratic, and not exactly right mentally" (fol. 840, p. 469).

It was for a larceny committed at Brockport that he was sentenced to the Penitentiary. The prosecutor in that case was found during this suit, and induced to apply to the District Attorney of Monroe County. "I requested the District Attorney that there be no further proceedings in the matter against Mr. Dunton, in regard to this arrest, or theft, as you might term it.

Q. At whose request did you call on the District Attorney?

A. Mr. Thacher's (defendant's counsel).

Q. What further proceedings did you understand were in progress?

A. I did not know that there was any, but my wishes were that there should not be any (p. 464). As the whole proceeding had terminated, and the term of sentence had expired some twelve years before, this desire on the part of the witness is unexplained, except by the exigencies of this suit. The defendant's evidence on this point seems to overlook the point, that the record of conviction is only of moment as proof of the fact of Dunton's dishonesty; and plenary evidence of that is given by the very witness whom the defendant procured to expunge the record. On his *cross-examination* in this case referring to the offense of which Dunton was convicted, he testified as follows:

Q. A search-warrant was issued, was there not, and the goods found in Dunton's lodging?

A. A search-warrant was issued, and part of the goods found in Dunton's lodgings.

Q, There had been a series of thefts committed there (Brockport), had there not, at about that time, in the same store, suspicion of which attached to

Dunton, which led to a watch being placed upon him, and his detection?

A. Yes, sir.

Q. And he was found by the officer who arrested him concealed in a barn, was he not?

A. The first I knew he found him in his room, where he went with a search-warrant.

Q. Have you any doubt that Dunton took the dress?

A. There are two dresses in question. I know he took one.

Q. Do you believe he intended to pay for it?

A. I don't think he did.

Q. Did you see him take it?

A. Yes, sir.

Q. Did he conceal it when he took it under his clothing:

A. He concealed it after he took it (fol. 829, 830, 832, pp. 463-4-5.)

There is no testimony that Dunton was ever cured of that mental peculiarity, which they describe under the various names of an erratic disposition, moral irresponsibility, and dementia. As, however, an insane state of mind once proved to exist is, in the absence of proof to the contrary, presumed to continue; it must be assumed that Dunton is still in the somewhat unusual condition of indifference to ordinary obligations, which the witnesses allege he displayed at an earlier period. If he could steal dresses without being morally responsible therefor, he could fabricate evidence without being morally responsible therefor; and the latter is, perhaps, the most charitable explanation of his conduct.

Such are the salient and material points of the mass of conflicting testimony concerning the alleged prior use by Dunton and his confederates, of pencils with a strip of rubber inserted in the lead groove at one end.

Viewed as a whole, it utterly fails to sustain the defendant's allegation that any such pencils were made by Dunton prior to Lipman's invention. It is

quite possible that Dunton made such pencils *after* Lipman's invention. Lipman's patent was applied for in January, 1858; combined implements made in accordance therewith were put upon the market by Lipman at a very early date. They were furnished to dealers in Boston as early as 1858, by Mr. Lipman personally, who went there for that purpose (fol. 201, p. 113).

Dunton, whose attention was liable to be arrested by a novelty of the sort, might readily have seen the article at the places he then frequented, and have taken therefrom the suggestion to make a rude implement of a somewhat similar construction by splitting a lead pencil in the way he describes. And he doubtless bought and used the Lipman pencil also. To claim as his own idea anything which he had that was new, was evidently characteristic of the man. He might readily have made such a claim to any one noticing the implement, and nothing could be easier than to persuade his friends, associates or relatives that a vague remembrance they might have of seeing such implements in his possession fifteen years before, was a remembrance of seeing them in his possession sixteen years before.

This necessity of carrying the date back by some striking piece of evidence, induced him to fabricate the exhibit. He was fully alive to this necessity, as is partly disclosed by his remark to the witness Waterhouse that the old pencils he then had (prior to his Camden visit), were not old enough or had not been made far enough back to do him any good in this case" (fol. 123, p. 67).

The hypothesis that Dunton, many years ago, used Lipman's combined implement, or made a rude imitation thereof for his own purposes, and that a general recollection of seeing such articles in his hands lingers in the minds of those whose memory is stimulated by association with Dunton or interest in this suit, or mere vanity and desire to appear as important witnesses, is credible and even probable; but the evidence does not, for a moment, stand the test of

affirmative proof to establish the fact that any such use by Dunton was *before* the date of Lipman's invention. The intrinsic improbabilities of the testimony, its inconsistencies, contradictions and uncertainty, the circumstantially proved fabrication of its center-piece, prevent its raising such a presumption.

Small faith is ever given to the mere memory of witnesses endeavoring to fix distant dates and to describe particulars unimportant at the time they were observed, but very important at the time they are testified to. As is stated in the opinion of the Court in Wood *v.* The Cleveland Rolling Mills, 4 Fish., 550:

"The confidence of the attacking witnesses is often in proportion to the distance in time that one is removed from the other. Their imagination is wrought upon by the influences to which their minds are subjected, and beguiles their memory."

Still less faith can be given to witnesses brought in, as in this case, to corroborate manufactured evidence, and introduced by the person charged with the fabrication, Dunton, from his own associates, and thus discredited by the corupt quarter from which they come.

CONCLUSIONS FROM THE 'DUNTON' TESTIMONY.

The learned Judge in the Circuit Court, in stating the reasons for his decision, says:

"I am constrained by what I deem the preponderance of the evidence to find, also, that before either of the alleged inventions of the above-named patentees, complete, practical, and useful pencils were made and put into open, practical use for several years, for writing, drawing and erasing, constructed by removing the lead from a portion of the groove in an ordinary leadpencil, and substituting therefor in such groove india-rubber as an eraser." (fol. 911, p. 506).

This conclusion, it is respectfully submitted, is erroneous.

It is erroneous for two reasons:

First.—Weighing and analyzing the evidence upon which the learned Judge's finding is founded, and applying thereto the legal principles and tests whereby actual weight is distinguished from mere bulk—as has been attempted in the preceding part of this brief—it is not legally possible to say that the preponderance of proof is in favor of the existence of the disputed pencils prior to the date of Lipman's invention.

It may be suggested, without disparagement, that the finding of the Court below, referring as it does to two inventions, the latter of which was not patented until 1872, was made in accidental disregard of the fact that the undisputed date of Lipman's invention was January, 1857, more than a year before his patent, as well as in disregard of some of the conclusive points concealed in the thick mass of testimony, points which, at the hearing below, counsel probably failed clearly to disclose and present.

Second.—But it is an error to suppose that a fact like that of the alleged existence of the Dunton pencils can be established, as against Lipman's Patent by mere *preponderance* of proof. Although, as will be shown, Dunton's pencil falls short of Lipman's invention ; although, even if it existed, it was one of the "lower organisms" falling short of the completed and successful structure made by Lipman, yet it is claimed by the defendant, and the maker of the alleged pencil to be a complete anticipation of the patent ; its existence as an implement which compares more or less nearly with the patented implement, and the identity of which to the patented implement is matter of controversy, is a fact to be proved by the same evidence that any other fact assailing the novelty of the patent is to be proved. It is a fact, pleaded by the defendant, as raising the issue of novelty, and must be supported by the kind, and amount of testimony required of those, who maintain the affirmative of that issue.

It is true the Dunton pencil, if made, would

not anticipate Lipman's invention as a whole; it would, however, deprive certain features of the Lipman invention of their novelty. No reason can be suggested why it should require less evidence to overcome the presumption of novelty, as to some of the parts of an invention, than to overcome that presumption as to *all* the parts of the invention. Every invention is bounded and limited by the actual state of the art at the time when it was made, but the state of the art means that body of knowledge belonging to the art proved to exist deyond doubt. Usually the facts relating to the state of the art are admitted facts. But when these boundaries are left, and the issue arises as to the existence of a distinct piece of prior mechanism, or certain distinct facts which, if proved, trench just so far upon the novelty of the patent—then the distinct issue of novelty is raised, and the rules of evidence which relate to that issue must be applied. The issue of novelty exists as soon as the boundaries of the undisputed facts in reference to the prior state of the art are passed.

Upon that issue, it is a familiar rule, that he who has the affirmative must satisfy the Court not only that the "*preponderance*" of a mass of conflicting evidence inclines to that side, but it must be established by proof so clear, decisive and free from contradiction as to exclude a *reasonable doubt.*

This proposition is thus expressed and supported by authorities in a late case:

Says the United States Circuit Court for the Eastern District of Michigan:

"The patent carries with it the presumption of novelty of the thing patented, and the burden of rebutting that presumption is upon the defendant. In order to defeat the patent on the ground of want of novelty, the proof of prior use or previous knowledge must be such as to establish the fact clearly and satisfactorily, and beyond a reasonable doubt. Where the proofs are contradictory, *mere preponderance* is not sufficient to sustain the allegation. *The*

preponderance in such case must be such as to remove all reasonable doubt."

In Wood *v.* Cleveland Rolling Mills Co., (4 Fish, Patent Cases, 550, 560), Mr. Justice Swayne said:

"When the defence is made out, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defence allowed to prevail *only when* the evidence is such as to leave no room for a reasonable doubt upon the subject."

In Perham *v.* American Button-Hole Company, &c., heard before Mr. Justice Strong and Circuit Judge McKennan, the latter, in delivering the opinion of the Court, said:

"The evidence must establish clearly the priority of a completed and useful machine over that of the patentee, or it is unavailing. *To doubt upon this point, is to resolve it in the negative.*"

In Sayles *v.* Chicago and North-western Railroad Company (4 Fish. Pat. Cas. 584, 590), Drummond, J., in a case nicely balanced on the evidence, sustained the patent. In Crouch *v.* Speer (6 Offi. Gaz. of the Patent Office, 187), Nixon, J., held that the defendant not only assumed the burden of proof of his allegation of want of novelty, but that his undertaking was to show affirmatively prior knowledge and use under such circumstances as to give the public the right of a continued use as against the patentee, and that he fails to do this when his evidence is frequently contradicted, and is inconsistent with itself. These doctrines I believe to be well grounded in principle, as well as established by repeated and uniform adjudications," (Longyear, J., E. D. Mich. U. S. Ct. Ct., 8 Off. Gaz. 685).

Says Judge Emmons, in speaking of testimony of the same kind as the mass of testimony produced by Dunton, viz: "the unreliable and unsupported evidence of mere memory" relattng to trivial occurrences, happening from fifteen to twenty years before:

"The Statute of Limitations furnishes the philosophy for disposing of such a case. There may be cases where the proof is beyond criticism and without conflict. In such cases this rule does not apply; but if there is any doubt, a *mere preponderance* of evidence is not sufficient."

Smith *v.* Fay, 6 Fish., 446, 452.

The appellant most earnestly contends that the preponderance in this case is all *against* Dunton's story, but the foregoing cases are cited merely to show what is the rule which is to be applied, even in case the preponderance had been as was found in the Court below.

Under that rule the reason given by the learned Judge in the Court below, for finding that the Dunton pencil existed prior to Lipman's invention, viz.: that he deemed the mere "preponderance of the evidence" to be in favor of that fact, is insufficient, and so to find, *for that reason*, was error.

As there can be no pretense for the proposition that the finding can be supported for a *sufficient* reason, viz.: because the evidence establishes the existence of such pencils prior to 1857 *beyond a reasonable doubt*; the finding is erroneous, in any event, and whatever reason be assigned for it.

The error, moreover, is material. The patent was construed by the Court below, and the questions of patentability and infringement determined upon the assumption of the prior existence of the Dunton pencils. Reverse that assumption and the reasoning of the learned Judge, upon the only point decided, entirely fails. If his decision was right it must be for other reasons than those given. The last hypothesis may, of course, be true; but the presumption in such a case is against it. *Prima facie*, if the only reasoning urged in support of the conclusion fails, no reasoning can be found to support it; and such, it will be submitted, is the present case.

Second.—Even if the Dunton pencil existed, it does not anticipate Lipman's invention.

The implement formed by picking a bit of the lead out of the end of an ordinary pencil, and substituting a piece of rubber in the lead groove thereof, as shown in Exhibit E, is like the Lipman implement in arrangement in having a continuous sheath, which may be cut away at either end, and in shape and size it is unlike the Lipman pencil in this: that it has no suitable groove for an eraser, and that as a consequence it is capable of such limited use as an eraser that, for such a purpose, it is practically worthless.

The specification of the Lipman Patent indicates that the end of the compound implement must be so constructed as to furnish a groove "suitable size" for an eraser, shown by reference to the drawing to be much larger than the groove for the lead (fol. 75, and drawing of patent.) The defendant's own expert, Mr. Faber du Faur, in describing Lipman's invention, specifies this as an essential feature. He says that, in the method of construction shown in Lipman's invention, the india-rubber is "inserted into an enlarged groove" (fol. 519).

Without this feature, there can be no eraser, because otherwise the erasive material would not be thick enough in diameter to offer sufficient resistance to erase a pencil mark.

This is obvious from inspection. The erasive material may indeed be as stated in Lipman's specification, sharpened to a point, but it must be a short thick point, nearly like that formed by the corner of an ordinary piece of rubber, and the requirement of the specification, that the erasing material used in the implement, shall be thicker than the lead, shows that such a sharpening is referred to.

The Dunton pencil, lacking this essential feature, cannot be used as an eraser, as a practical trial will show. The thread of rubber inserted in the lead groove is so slender that if enough of it is exposed to be used at all, it gives way, when rubbed over a mark with

the least pressure, to such an extent that the wooden edges that surround it, are at once brought in contact with the paper or other surface on which the erasing is attempted.

Hence it follows that even if the Dunton implement was made—it was not "complete, practical and useful,"—but the very reverse.

It could not anticipate the patent, because a compound implement so constructed would be without value or utility, as a combined pencil and eraser. The defendant never attempted to make such an article, because he well-knows no one could be found to buy it.

No such article has ever gone into public use, at any time, and it is safe to say never will go into such use.

So plain was this defect in his fabricated implement, that Dunton feebly attempts to break its force by saying that he, also, sometimes used to make an enlarged groove for an eraser; but he is careful not to assign any date to such an act, on his part, (fol. 381, p. 215,) and does not say that it was *before* Lipman's invention, and he quickly drops the subject, and no attempt whatever was made to corroborate him, or to show that he ever did so, even after Lipman's invention. As the proof stands, Exhibit E. must be taken, as the standard of what Dunton claims to have done prior to Lipman, and that Exhibit, itself, is the best of all evidence to show that, even, if such implements were made before Lipman's invention, they only serve, when compared with that invention, to illustrate the difference between failure and success.

IV.

Lipman's invention has now been compared with the four implements, which are the only implements consisting of a pencil and eraser combined, claimed to have been known or used prior to that invention. It has been shown that, as to *three* of these imple-

ments, there is no sufficient proof to establish the allegation, as against the patent, that they ever existed at all, prior to Lipman's invention ; and, that, as to the whole four, when separately considered, they are, each, wanting in some or all of the essential features of that invention.

Even if all of them were actually made at the early period the defendant claims ; they only existed, at that period, as the results of a few of the unsuccessful attempts which invariably precede the final production of a new and useful manufacture.

V.

Utility of Lipman's Invention.

The next inquiry, in order, is, what is the extent and value of the result due to the peculiar properties which distinguished the implement which Lipman invented from other implements of the same class. The answer to this question admits of no dispute.

Third.—The result of Lipman's invention shows that the implement devised by him possessed utility to an extraordinary degree.

It may be briefly stated that, so far as the proofs show, and if the fact were otherwise, it must have appeared in evidence. Lipman's was the first practical and useful combined pencil and eraser *ever made.*

The few rude attempts prior to his invention amounted to nothing, and resulted in nothing.

He gave the world a new and useful implement, and since Lipman's invention, they have gradually come into almost universal consumption.

The complainant, furnished them to the public and his works show that the demand for them gradually rose until it required their manufacture by the million, to supply the market.

The complainant (who had purchased the patent)

sold of the compound implements, first of the Lipman and afterwards the Lipman with the Reckendorfer improvement.

In 1863	24,192
" 1864	51,840
" 1865	56,592
" 1866	60,624
" 1867	152,064
" 1868	177,840
" 1869	328,464
" 1870	1,199,088
" 1871	2,188,080
" 1872	2,148,192

(fol. 271, p. 153). Thus it appears that up to the period just preceding the commencement of this suit, the sales of the inventions had within ten years, risen from about twenty-four thousand implements per annum to about two millions of the same per annum, and as the defendant's infringements commenced shortly before the period mentioned, the amount of the complainant's sales does not include the whole number placed upon the market.

In view of the foregoing facts, no doubt rests upon the proposition that the implement which Lipman invented had properties which rendered it highly useful, and created for it a most extensive demand.

Patentability.

The only remaining inquiry is: Is the Lipman implement of such a character that its production did not involve invention? Notwithstanding the novel combination of useful properties which it has been shown to possess, must it be regarded as the mere offspring of mechanical skill, and its excellence due to mere superiority of workmanship.

This point was not decided in the Court below, but it was considered, and an intimation was expressed adverse to the claim of the patent. This went no

further, however, than a query, the decision being placed upon the ground, that upon the narrow construction which was given to the claim of the patent, the defendant did not infringe. It is important to discuss the question here, not only to show that Lipman's invention is a genuine invention, and patentable as such, but also because the reasons which lead to that conclusion, are reasons which show, as well, that the patent should receive a different construction from that which was placed upon it in the Court below.

The appellant contends that what is described and claimed in the Lipman patent fulfills every requisite of a true invention in the eye of the law.

First.—The whole solution of the question here raised is easy when the fact is kept steadily in view, that, as has already been shown, the patent is one for a new article of manufacture (not a new article of *trade* merely), but a new manufacture, consisting of a tool or implement, having certain distinctive novel and useful properties of its own. It is not a patent for a "combination" of mechanical devices, in the technical sense of the word.

Independently of any question of the combination or aggregation of its parts, the fact that it presents a novel combination of useful *qualities*—that it has as a completed thing certain characteristic and valuable peculiarities of structure, are the facts that give it its patentable character.

This is the rule applied to all patents of this class, both by the Office and the Courts.

The Commissioner of Patents, in a case already cited, overruling the decision of the Board of Appeal and issuing a patent for a certain kind of stove-pipe elbow, as a new manufacture, quotes the Appeal Board as saying (adopting the same kind of objections are are urged against Lipman's invention):

"The article is called a new invention; but when

we attempt to designate what is novel, we find ourselves baffled. It is not uniformity of thickness, nor curvature, nor smoothness, nor freedom from crimps; all these are in Vane's device (curved lead pipe). It is not sheet iron; that is the common material for stove pipes."

"But," proceeds the opinion, "can anything be plainer than that the novelty is in having all these qualities united in a single article, making it a specific unit, and, as a unit, essentially different in itself from any other of its kind?"

(5 Off. Gaz. 489, Lupton's Appeal).

The determination of the patentability of manufactures of this kind depends, (as has been stated), upon the *character* of the distinctive properties which distinguish them.

If such properties consist in the mere substitution of material, or in mere degree or fineness of workmanship, they do not confer a patentable character upon the object to which they belong. This is because mere difference in material, or mere difference in degree or workmanship, is not recognized as constituting a novelty in the sense of the patent law. and so there may be other differences so slight that they must be considered as falling with the range of known variations of the article which possesses them, and which are, therefore, no proof of novelty. But if the difference is one of kind, and not of degree, workmanship or mere variety, they are recognized as the distinguishing marks of patentable novelty.

Border line cases must, of course, occur, in which it is difficult to determine whether or not the difference which may distinguish a given article of manufacture from others of its class, as matter of fact, merely one of degree, workmanship or known variation; but no such difficulty arises in the present instance.

The properties which distinguish Lipman's implement do not arise from any superiority of workmanship, or change in degree, or mere variation in the

manufacture of an old article, such, for example, as painting a pencil blue, when pencils had previously been painted black. It's useful properties, as has been shown by a comparison with all implements of the same class known before, arise from genuine differences in structure, which make it the first successful implement of the kind that was ever made.

Now, while in the Court below, the character of Lipman's invention as a new manufacture was in part recognized and stated, yet, in discussing its patentable character, some confusion seems to have arisen by not keeping in view the distinct and correct definition of that invention, and the rules above stated for determining the patentability of the class to which it belongs.

Sometimes regard is had to the amount of thought or study involved in its production ; sometimes it is treated as if claimed as a mere technical combination of mechanical devices ; or as if it were simply a machine. Of course, it is not claimed that there is any difference in the fundamental principles which determine alike the patentability of all subjects. It is only claimed that, in the application of these rules, due regard must be had to the particular class of subjects, which may be under consideration.

Second.—The patentability of Lipman's invention was questioned or denied in the Court below, on substantially but two grounds, viz.: first.—That in view of what was done before the construction of the Lipman implement, involved no "thought or study" (fol. 916); *i. e.*, was too obvious to sustain a patent therefor ; and second.—That the implement shows an aggregation as distinguished from a combination.

I. The second of these objections will be first considered.

It is thus stated in the opinion :

"Where the functions and uses of each are unaffected by the union, and the means of uniting has no novelty, it is not obvious, certainly, that anything

of invention can be alleged of the combined implements," (Sawyer *v.* Bixby, 9 Blatch. 362).

That the aggregated result may be very convenient, may for that reason be popular and may find a ready sale, and that such sales are very large and show a great demand, does not determine the question. As suggested in several cases relating to aggregation as distinguished from patentable combinations, the aggregate result may be the production of a better structure as an aggregate than was ever before produced; and yet, for the lack of novelty of device or new result produced by the aggregation and due thereto, it may have no patentable quality," (citing Hailes *v.* Van Wormer, since reported 20 Wall, and cognate cases).

1. The first and most obvious reply to this criticism is, that the doctrine referred to only relates to cases in which an invention, claimed to be a "combination," *i. e.*, a number of ingredients coöperating to produce a novel result, is found on examination to have no existence; because the constituent elements have no reciprocal action. They are aggregated, but not combined.

But, it does not follow from this that every invention which is not a combination is not, therefore, patentable. In one sense of the word, everything made by the hand of man is a combination; *i. e.*, it consists of a combination of parts; but that is not the meaning of the word "combination" when it is used to designate a certain class of patentable inventions. A new manufacture may be patentable, not because it presents a novel combination of parts, but simply because it presents a novel combination of properties and qualities. A peculiarity of structure, device or arrangement, giving a new and useful property to the article to which such peculiarity belongs, may disclose a true invention and sustain a patent, although it may not warrant a claim for a combination.

It is to this class, as already shown that the Lipman invention belongs. The peculiar structure and arrangement of the implement, he describes and claims, impart to it certain highly useful properties. Its patentable character depends upon this fact, and it is, therefore, immaterial whether or not it may also be claimed as a patentable combination.

If the point could be established that it could *not* be claimed as a "combination," merely, that would not be conclusive against its patentability.

A precisely similar question was decided in the Russell & Erwin Man. Co., *v* Mallery (10 Blatch. 140), where the same objection was raised to defeat the patent sued upon, and was effectively answered, upon substantially the grounds here suggested by the learned Justice himself from whose decision this appeal is taken.

The objection and the answer thereto are thus stated in the opinion of the Court:

"It is earnestly insisted that the patent granted to Webb, on which alone the complainants rely, is void upon facts that are not controverted or are already established, namely that locks were common and latches were common, and locks combined with latches were common long before the alleged invention of Webb, and that his Letters Patent purport to be for a combination merely; that, conceding that Webb's improved latch was new, he patented simply the combination of the latch with the lock, which was simply aggregating two things, which had distinct and separate operation, each unaffected by the operation or even the presence of the other; that in short, as there was no relation between them in the performance of their several functions, and no reciprocal action, they are not patentable as a combination; and that the complainants patent is, therefore void.

"The claim in the specification annexed to the patent of Webb, which is thus attacked, reads as follows: "What I claim, therefore, and desire to secure by Letters Patent, is: The combination of a lock and

latch, when the latch-bolt and its operative mechanism are arranged in a case or frame, independent of the main case, and constructed so that the latch-bolt may be reversed substantially as described, without removing the said independent case from the main case.

"We are not inclined to depart from what was said in Hailes *v.* Van Wormer, on the distinction between a patentable combination, and a mere aggregation of old elements having no relation to each other, or any reciprocal or co-operative action to produce the result attained. But claims should be read in connection with the specification itself, and read in the light gained therefrom, and it is proper to give such construction to the language employed as expresses the evident intention, if that may be done, the expression in the claim, 'the combination of a lock and latch' is not to be technically construed. The whole specification shows what the improvement was, and that the lock mechanism has no effect upon its operation. The terms used mean just what is meant by 'a combined lock and latch,' or 'a united lock and latch' or 'a lock and latch,' when indicating a single article of manufacture and use. It is that aggregate structure, when it contains within the main case the special arrangement and device which the inventor describes, that he claims as his invention."

As the aggregate structure in that case, which consisted, in brief, of a structure in which the latch was fitted inside a thin case, and placed within the main case of the lock, so that the latch part could be turned round at will, and fitted to either a right or left hand door, was found to be novel, the patent was sustained.

The reasoning, and, indeed, *mutatis mutandis*, the very language of this opinion applies to the invention involved in this appeal.

It may, with equal force, be said in relation to Lipman's Patent, that it is a patent for a "combined pencil and eraser," or "a united pencil and eraser,"

or "a pencil and eraser," "when indicating a single article of manufacture or use." "It is that aggregate structure," when it "contains the special arrangement" and device which the inventor describes, that constitutes his invention. And that such invention is for an "aggregate structure," and not for a combination, does not in the least interfere with its patentable character.

Says the Patent Office in a very late case:

"But there are cases where invention may be exercised and useful results accomplished, in the collocation of machines or devices which do not in any sense co-operate in what may be strictly called their action. Cases of such mere aggregation have been heretofore fully discussed, as in Com. Dec. upon the application of Linus Yale, 1869, and that in the case of Lehmann, 1870, and of Abel Combs, 1871. An exception, however, was referred to by the Commissioner in considering the Lehmann case, in relation to

"Combined implements, which use certain parts in common, and so save the expense of duplicating such parts."

"The Commissioner was of the opinion that such inventions are useful, and, if new, undoubtedly patentable."

Sherman's Appeal, 7 Off. Gaz., 1054.

In Hall *v.* Wiles, (2 Blach. 194) the patent was for an improvement in the construction of the brick press, and the case turned upon the question whether the "carriage E" of the patent as constructed by the patentee, was to be regarded, of itself, a new improvement, in view of the carriages which had been in use prior to the invention of the plaintiff."

Judge Nelson in charging the jury says:

"I do not agree with the counsel for the patentee, that the Carriage *E*, as constructed by the patentee, is to be regarded as embracing a combination of materials, within the doctrine of the patent law, and that, unless the defendant has taken the whole of the

combination, he is not liable. My opinion is that that principle does not apply.

If the Carriage *E*, as constructed by the plaintiff, is not a a substantial improvement upon all previous constructions, he is not entitled to recover. But if you arrive at the conclusion that that carriage is a substantial improvement upon all previous constructions, then the question is, whether the carriage used by defendant is identical with that of the plaintiff. If it is, it is an infringement," &c.

2 Blatch., 194.

2. But the appellant respectfully contends that it is not correct to say that the Lipman invention does not, also, disclose a veritable combination. The pencil and the eraser are combined and united in the compound implement, not aggregated.

The criticism is that "the functions and uses of each are unaffected by the union."

This cannot mean that the pencil and the eraser must, *as such*, perform some new or different functions in the compound implement. The very useful purpose to be attained by uniting them is that each may perform its characteristic function of a marker or an eraser in the compound implement, in the same manner and as well as it performs that function when used as a seperate instrument. To assert that the two constituents must perform some *new* function in the compound implement as a condition of the patentability of the whole structure, would prove too much, and show that such a compound implement can never be patentable, while it is a conceded fact that such implements may be patentable.

To put an extreme case: it cannot be intended to assert that, if the pencil and the eraser act in the compouud implement, as a marker or an eraser respectively, just as they do when separate, the implement is *not* patentable, but that if the pencil may also serve as a paint brush and the eraser as a

blotter, in the compound implement, that then the latter *is* patentable.

If, however, it is only meant that "the functions and uses" of the constituent implements must be "affected" by their relation to each other in the compound implement, without destroying the characteristic functions and uses which they have as separate implements, then, in the present instance, they *are* so affected.

(*a*) When one end of the compound implement is used the eraser serves as a handle for the pencil, and, reciprocally, when the other end of the compound implement is used, the pencil serves as a handle for the eraser. Combined in the single implement shown in the patent, each performs a new and distinct function; viz., that of furnishing a handle for the other, which neither performs when existing as a separate tool.

In this respect, therefore, the functions and uses of the constituent tools are directly affected by the combination in which they are placed.

(*b*) The pencil and the eraser formed at the opposite ends of the patented implement have, as a consequence of that arrangement, a constant relation of position to each other, which produces a useful result, and arises solely frem their union in a single tool. The pencil and the eraser supplement each other in use. It is a great convenience to have the one always so close to the other, that it cannot be lost, and can be brought into use by a mere turn of the hand.

The arrangement shown in the patented implement accomplishes this purpose. The pencil and the eraser are thereby kept always near together, and yet at a fixed and convenient distance apart, so that, at all times, each occupies the place relatively to the other where it may be, with the greatest readiness, brought into use.

It appears, therefore, that the union of the pencil and eraser in a single tool produces an interchange of functions, and, also, establishes a mutual relation,

arising from their arrangement in the compound implement, which gives a useful result.

This is the test of a true combination. The elements of which the united implements is composed are not simply aggregated, but co-operate together to form the whole structure which is the subject of the patent.

The cases of aggregation pronounced unpatentable by the Courts may all be distinguished from the case presented by the Lipman invention.

In the leading case of Hailes *v.* Van Wormer (20 Wall.), the combinations claimed were between the parts of a stove, having no relation to each other, as, for example, the illuminated doors and flues, between which there was no more mutual relation than there might be between the parlor windows of a house and the furnace in the cellar.

The stove did not present an instance of such a union of parts that it could be made to do a double duty, as is the case with the Lipman implement. If it had, a very different question would have arisen.

Let it be supposed, for instance, that the combination claimed had been between a stove and an oven. Ovens were originally built separate from stoves. The person who first united the stove and the oven, and thus made the first cooking-stove, undoubtedly made an invention, and a highly useful one, and the parts were in true combination, and yet both stove and oven performed the same functions which they performed when separate appliances. The case supposed is much more closely analogous to the Lipman Patent than that shown in Hailes *v.* Van Wormer.

The early decisions of the Patent Office, cited by the learned Judge in the Court below, as tending to disaffirm the patentability of the device of uniting two tools by the use of certain parts in common, if they can be construed to have any such effect, have not been followed in later decisions. Such devices are now fully recognized as constituting proper com-

binations. The late case of Sherman's appeal (7 Off. Gaz., 105) already cited is directly in point.

In that case a knife and a machine intended to be used in connection with each other, but which had been so used as separate implements, placed on separate tables or stands, were united together and arranged so that one table served for both. The application was at first rejected on the ground that the knife and the machine did not cooperate in any patentable sense. But this decision was reversed. "This lack of cooperation in the action of the parts," says the prevailing opinion, "is too plain to require discussion; and if appellant's case rested upon this alone, I should without hesitation decide against him." But it is held the "arrangement is such that upon the same table, without interfering with the devices which form the metallic bearings the knife and device for holding the slat to be cut are all conveniently located, both for receiving motive power from the main machine, and for approach and easy manipulation by the attendant. This is something more than mere aggregation. The continuation is such that the same table which supports the central machine is made without any enlargement to support the auxiliary machine."

The case of Sawyer *v.* Bixby (9 Blatch, 361) involved clearly a case of pure double use, and does not apply; moreover, in that case it was found as a fact that the patent had been completely anticipated. (See opinion *ad fin*, pp. 362-3.)

II. The remaining objection against the Lipman invention, which was taken in the Court below, is that it was too obvious to justify the name "invention"—that no "thought or study" was required to produce the implement described in the patent, and that its construction did not call into exercise the inventive faculty.

The point is thus stated in the opinion: "If, to attain the utility and convenience which the union of two implements produces something new in construction of the implements, or some new device requiring thought or study (more or less) is necessary to unite them, such union may be patentable. But here each implement is constructed precisely as it was before, and the means of union was not in its self novel. It was like inserting two awls of different sizes or uses on one handle," &c.

1. The first observation which may be made upon this criticism is, that the best proof that a device requires the "thought or study" whether "more or less," which implies invention, is that *no one has thought of it before.* The test of invention is to be sought, not by an inquiry into mental processes, but by a comparison of tangible results. It is true that in some instances certain things derive their names from the kind of mental faculty supposed to be involved in their production, and are classified accordingly. But, in these instances, the inquiry actually goes no farther than an examination of the sensible properties and features of a tangible product and a comparison with other products of the same kind. If that comparison discloses a substantial novelty, and not simply one of degree, material, etc., the inquiry ends. Any other test than this must inevitably lead to uncertain, arbitrary and profitless results. The obviousness of an alleged invention is no guide by which to ascertain either its existence or its value. "Obviousness" is a purely relative term; what is "obvious" to one is not obvious to another; the vast majority of all the appliances and conveniences which the public now possess, are the result of accumulated steps, each so small and apparently trivial in itself, and so obvious, *after* it has been taken, that it is difficult to imagine why it was not taken before.

In one of the earliest decisions under the Statutes concerning patents, the rule that not obviousness, but novelty, is the true test of invention, was favorably expressed by an eminent authority.

The invention, in that case, consisted in substituting a circular for a perpendicular saw in a shingle mill.

The objection that such substitutions involved the exercise of no thought or contrivance, and was not an invention, was the one urged against the patent, but Judge Story, answering the objection, said:

"The whole argument upon which this doctrine is attempted to be sustained is, if I rightly comprehend it to this effect. It is not sufficient that a thing is new and useful to entitle the author of it to a patent: he must do more; he must find it out by mental labor and intellectual creation; if the result of accident, it must be what would not occur to all persons skilled in the art, who wished to produce the same result; there must be some addition to the common stock of knowledge, and not merely the first use of what was known before. The Patent Act gives a reward for the communication of that which might be otherwise witholden. An invention is the finding out by some effort of the understanding. The mere putting of two things together, although never done before, is no invention.

"It did not appear to me on the trial, and does not appear to me now, that this mode of reasoning upon the metaphysical nature, or the abstract definition of an invention can justly be applied to cases under the Patent Act. That Act proceeds upon the language of common sense, and common life, and has nothing mysterious or equivocal in it." * *

"The thing to be patented" * * "must be *new* and not *known* or *used* before the application; that is, the party must have found out, created or constructed some art, machine etc., or improvement on some art, machine, etc., which had not been previously found out, created or constructed by any other person. It is of no consequence whether the thing be simple or complicated; whether it be by accident, or by long laborious thought, or by instantaneous flash of mind, that it is first done. The law

looks to the fact, and not the process by which it is accomplishcd."

* * * * *

"The first question then to be asked, in cases of this nature, is whether the thing has been done before. * * If it is *new*, if it is *useful*, if it has *not been known* or used before, it constitutes an invention within the very terms of the Act, and, in my judgment, within the very sense and intendment of the Legislature. I am utterly at a loss to give any other interpretation of the Act; and, indeed, in the very attempt to make that more clear, which is expressed in unambiguous terms in the law itself, there is danger of creating an artificial obscurity."

Earl *v.* Sawyer, 4 Mason, 1 pp. 5 etc.

The foregoing opinion, though often quoted and long since rendered, may be appropriately cited again. It may well be suggested whether a tendency to depart from the sound rule of construction therein expressed, and to lean towards metaphysical rather than practical distinctions, has not in the course of time produced somewhat of the "artificial obscurity," in this branch of the law, which the learned jurist sought to avoid.

2. The patentability, then, of Lipman's invention is to be determined from an examination of the character of the differences which distinguish the implement he made and described from others of its class.

In the language of the Court below, the implement is patentable, if there is "something new in the construction of the implements" united to form it, or if "some new device, requiring thought or study (more or less) is employed in effecting the union."

Understanding, that the evidence of "thought or study" is to be derived from the properties and structure of the implement itself, then Lipman's invention will be found to answer to the test proposed.

The "something new in the construction of the implements" consists in this: each is constructed as to a part of its length, as it is constructed when it is a single implement, but as to the rest of its length, it is constructed differently; the eraser, as to the rest, is constructed so as to form a pencil, and the pencil, as to the rest, is constructed so as to form an eraser.

The "new device employed in effecting the union" is this: two grooves arranged at opposite ends of the same sheath, each groove being suitable for different purposes, and one being, therefore, larger than the other, and having a different length relatively to the other. It is said this means of union "was not *in itself* novel." It is not necessary that it should be *in itself* novel; it is enough if it is novel *in its application to uniting pencils and erasers.* All new processes and new results are made up of new applications of old means. If the new application does not consist of a purely double use, like using a scissors to cut paper which had previously been used to cut cloth; it makes an invention.

In Strong *v.* Noble, (6 Blatch., 477) the invention consisted simply of "a whip, having the handle or any other portion, covered with a knit fabric."

In maintaining the patent, the Court says:

"The first defense set up is, that the invention patented is not a patentable invention. It is urged that the knit fabric, referred to in the first claim, is a tubular knit fabric; that it appears, by the evidence, that tubular knit fabrics were known and used, for various purposes, before Woodbury applied such a fabric to the covering of whips; that the application in accordance with the patent, of such knit fabric to the covering of a whip is merely the application of an old article to a new use; and that, therefore, the patent is void as respects the first claim. The conclusion by no means follows from the premise; although a tubular knit fabric

was old, and although a whip was old, and although the idea of covering a whip and a whip handle with something, was old, it by no means follows that the application, in the manner shown in the specification, of such a knit fabric to the covering of a whip, so as to produce a whip or a whip handle, covered with such a fabric, substantially as described in this patent, is merely applying the knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent. Such applications are of this character: using an umbrella to ward off the rays of the sun, it having been before used to keep of the rain; eating peas with a spoon, it having been before used to eat soup with; cutting bread with a knife, it having been before used to cut meat with. To apply the principle here invoked to avoid the first claim of this patent would render void the mass of patents that are now granted.

There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve anything more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it. In the present case, the points of advantage, set forth in the specification as attending the invention, are ornament, economy and durability. It could not be told necessarily, *a priori*, without experiment, that these advantages would accompany the application of the knit fabric as a covering for the whip."

So, in the present case, it could not be told necessarily, *a priori*, without experiment, that the advantages of great utility, sufficient strength and efficiency, and the production of an instrument as serviceable for either a pencil or an eraser, as separate implements intended for those purposes, would accompany the application of the device of a common handle, with different grooves, to the manufacture of a combined pencil and eraser.

But, in addition to this, it is not accurate to say that the means of union was not "in itself" novel.

There is no proof of the employment of grooves of different sizes at opposite ends of a common handle having ever been applied to the purpose of making a double tool before Lipman's invention. No evidence was taken to establish such a fact, and no exhibit produced to illustrate it. A single instance is shown where different kinds of erasing material were placed at opposite ends of the same groove; but that is a means only suitable for uniting two kinds of the *same* implement, and it may be seen, as a consequence of this, that the eraser suitable for erasing either ink or pencil marks, which is put in evidence (defendant's Exhibit T), is constructed throughout its length of a size and shape which would make it awkward and impracticable for use as a pencil.

It may be said that, given the idea that a single groove in a continuous handle can hold different materials at opposite ends, there is no invention in altering the ends of the groove to accommodate them to substances requiring a change of size in the groove.

But there is invention in perceiving the utility of uniting two grooves, suitable for different purposes, in a single continuous handle, for the purpose of making a combined pencil and eraser, which no one thought of before Lipman, and until Lipman embodied his idea in a practical implement, it could not be asserted that such a thing would work in practice. It is never safe to predict that the simplest device will not disclose defects in making a new application thereof. The opinion of the learned Judge in the Court below, affords an illustration of this. Lipman's invention is said to be "like inserting two awls of different sizes or uses in one handle."

The inference from which is, that that is something which any one can successfully accomplish, without experiment or contrivance.

But if two awls of different sizes or uses were inserted in one handle, as the eraser and lead of Lipman's invention are inserted in one handle, a moment's practical trial would prove that such a device could not be applied to awls. If two awls of different sizes or uses were inserted at opposite ends of the same handle, one would so interfere with the use of the other as to make the combined tool practically worthless.

To insert two awls of different sizes or uses in the same handle, is by no means an easy problem. It would be difficult to prove that it has ever been satisfactorily done. Indeed, the device of uniting two tools of any description, either through a common handle, or in any other way, is not the simple affair which it may, at first sight, appear. It is in reality a difficult task, and one seldom perfectly accomplished. It is rarely so far accomplished that for every purpose, and in actual practical use, the combined implement performs two functions, in every respect as perfectly as the same functions are performed by distinct and sepa- instruments. Of combined implements of this description, very few find their way to the workbench of the artisan. They exist as articles of fancy, or for show, but only a small number have ever passed into general use.

That the Lipman implement belongs to this small number strongly tends to prove its inventive character.

The simplicity of the idea involved in the implement does not take away that character. The most meritorious inventions are those which spring from the perception of the simplest and most direct means of accomplishing a useful result. No better tribute to the genuineness of an invention can be paid than the universal expression, upon first seeing it, "Why, any person might have thought of *that* before." But it is not enough to anticipate an invention, that it *might* have been known by others before the inventor made it. The law requires that

it shall be *actually* known by others, to have that effect. But, a thing is not known until it is perceived, and the perception of the *means* of knowing is not the knowledge itself. The pencil trade knew that pencils were enclosed in sheaths which could be cut away, and also that erasers were enclosed in sheaths the same in kind, but differing in the dimensions of their interior grooves, and also knew, generally, that different objects could be united by inserting them in a common handle; bnt no one put these three ideas *together*, and perceived their application to making a combined implement which should serve both as a pencil and eraser, until Lipman did so; and, until the ideas were thus put together, and their application perceived, Lipman's conception was not *known*, but only the *means* of arriving at it were known. It makes no matter how small the step may seem from the platform of the constituent perceptions, to the platform where these conceptions are united. That step marks precisely the difference between knowledge and ignorance, and until it is taken the invention is not made.

Before Lipman's invention the idea of attaching an eraser to a pencil had been conceived. The utility of such a union was obvious. All the means, however, which have been thought of and tried for that purpose were ineffective. Some had one defect and some another. There was one respect in which all failed, viz.: the united implements did not afford practical and useful erasers: they were all pencils, with insufficient erasers attached to them. Lipman, noticing that one sort of eraser had a sheath like a pencil, only larger, saw that the principle of uniting through a common handle might be applied; that one sheath properly modified might be made to serve for both, and thus a really practical eraser and pencil might be united, instead, as has been previously done, of simply attaching, in some way, a little bit of nearly useless rubber to a pencil. That idea, easy of suggestion as it may seem, had not been

thought of before. Even if the Dunton pencils had existed, the essential feature of modifying the sheath so as to make one end of the compound implement a genuine eraser, instead of merely a pencil with an ineffective bit of erasing material substituted for the lead, had occurred to no one.

Embodying this idea in an actual tool, Lipman completed his invention by trial, and demonstrated that it would work.

This, too, was an essential step. Even if the same idea as occurred to Lipman, had occurred to another, yet, unless the idea had been embodied in a practical form before Lipman so embodied it, Lipman would still remain the first inventor.

III.—To sum up the argument as to the patentability of Lipman's invention, the appellant contends:

1. That the patent is to be constructed as one for a new manufacture having a novel combination of useful qualities, and novel and useful peculiarities of structure, as a completed article; that it is not to be construed as a patent for a machine, or a mere combination, in the technical sense of mechanical devices.

2. That, thus construed, and compared with every article of the same class proved to have been previously known or used, it is found to possess the following useful properties: the pencil and eraser are enclosed in a sheath, which can be cut away to expose fresh portions of each, as required for use; the eraser is thus preserved, and lasts as long as the pencil, instead of being used up before the pencil, as is the case when it consists of the attachment of a mere bit of rubber; the erasing part forms a really effective eraser, besides having a peculiar adaptability for erasing fine lines, or lines close together; the common sheath or handle is an economical arrange-

ment of space whereby the whole is made compact, and in shape and appearance no more than an ordinary leadpencil, while serving the double purpose of a pencil and eraser; it is simple and can be cheaply made, and the combined implement is as good for either the purpose of erasing or marking, as separate implements intended for one of those purposes alone. Some, though not all, of these useful properties were found in combined pencils and erasers which previously existed; none that previously existed had all of these properties at the same time.

Its novel and useful peculiarities of structure consisted in this, a common sheath or handle, so modified as to its interior grooves that grooves of different dimensions, and suitable for containing materials intended for opposite purposes are contained in the same sheath, a device, so far as the evidence discloses, "new in itself." A modified form of eraser, so that part of it shall form a handle for a pencil, and a modified form of pencil, so that part of it shall form a handle for an eraser; such an organization of two separate implements in a single tool that certain parts of the latter shall serve a double purpose, are devices new in their *application* to *pencils and erasers.*

3. That the conception of the application of these devices to uniting pencils and erasers, the perception of the peculiar utility of such application, the embodiment of the idea in a tangible form, proving (which could not be actually known until so proved) that such embodiment would be, in every respect, practically successful, constitutes true invention.

4. That this conclusion is strengthened by two circumstances:

(*a*) However obvious the application of devices made by Lipman may now appear, nevertheless nobody thought of it before, although the useful object to be attained by such application was an object of attention. Pencil-makers had tried and were trying various means to make a united pencil and eraser; the utility and value of a united pencil and

eraser were plain to be seen, as well as the profit to be made by any one who might devise a simple way of making such articles so that they might be manufactured on a large scale; yet to no person skilled in the art, or otherwise, occurred the idea embodied in the implement made by Lipman.

(*b*) The great utility of the invention has been proved by its being the foundation of a new kind of manufacture and the subject of a large public demand. This, under the circumstances of thi case, is a strong piece of evidence, to show the existence of a genuine invention.

"Utility," says the United States Circuit Court, "is not an infallible test of originality. * * But the effect produced by a change is often an appropriate, though not a controling consideration, in determining the character of the change itself. In this case, (the case of the invention of a door-bolt only slightly differing from former bolts) the result of what may not improperly be called the new organization of the common door-bolt by Hart, was both considerable and useful. The evidence abundantly shows, that the new article superseded the old ones in the market. It can be manufactured with less expense. It is certainly, a much more neat and compact article than any in prior use, * * these advantages resulted from the change made by Hart, and claimed in his specifications.

Stanley works *v.* Sargent 8 Bl. 344.

In the case before the Court, the utility of Lipmans' implement did not arise from a mere matter of degree (as in Smith *v.* Nichols, 21 Wall., 112) nor from a mere aggregation of mechanical devices (as in Hailes *v.* Van Wormer, 20 Wall., 354) nor from a mere variation of things intended to be variable in use (as in Kay *v.* Marshall 2 Web. Pat. Cas., 34, 84, Curt. on Pat. §59) nor from mere change of material (as in Hotckiss *v.* Greenwood, 11 How., 248) nor from mere superiority of workmanship; and, if the utility of the change cannot be attributed to any of

these causes, the process of reasoning by exclusion, leads plainly to the conclusion, that utility was due to the presence of actual invention.

It is, therefore, claimed that it was error to hold that Lipman's was not a true invention.

This conclusion is fortified by authority.

Numerous patents have been granted and sustained for articles of manufacture, including patents for the union of two tools in one implement, upon the principles above laid down.

Matter of Lipman, 1 Off. Gaz., 304.
Penn. Salt Man. Co., *v.* Thomas, 5 Fish, 148.
Same *v.* Gugenheim, 3 Fish, 423.
Robertson *v.* Secombe Manuf. Co., 6 Fish, 268.
Masury *v.* Anderson, 6 Fish, 457.
Barnes *v.* Straus, 5 Fish, 531.
Putnam *v.* Hickey, id., 334.
Masury *v.* Tiemann, 8 Blatch., 429.
Arkell *v.* J. M. Hurd & Co., 7 Blatch., 475.
R. R. Co. *v.* Dubois, 12 Wall., 47.
Hawes *v.* Washburne, 5 Off. Gaz., 491.
Grosjean *v.* The Peck, &c., Co., 11, Blatch., 54.
Welling *v.* Rubber, &c., Co., 7 Off. Gaz. 606.
Re Lehman, Cun., Dec., 1870, p. 70.
Many *v.* Jagger, 1 Blatch., 372.
Monce *v.* Adams, 7 Off. Gaz., 177.
Sherman's Appeal, id., 1054.
Culp's Appeal, 5 id., 427.
Platt *v.* U. S., &c., Co., 1 Off. Gaz., 524.
Matter of Wachs, 8 Off. Gaz., 907.

In the matter of *Lipman* (1 Off. Gaz., 304), Commissioner Legget in granting the extension of the patent involved in this suit, against the opposition of the present defendant, used the following language:

"The principle involved in the construction of the Lipman pencil, however, underlies all the subsequent improvements, and is the basis and foundation upon which they are built. The original trunk was Lipman's; the improvements of Reckendorfer and others were engrafted upon it. As patented, the Lipman pencil was capable of being used for the purpose intended, and hence had the requisite usefulness demanded by the law; and being at the head

of a class, the invention is one of those always regarded with favor in the office."

There does not seem to be a reasonable doubt, but that the Lipman combined pencil and eraser involves as much, or more, invention in its application of principles and means to a new use, as was involved in the making of the caustic alkali package (5 Fish. 148), the hand stamp (2 Fish. 268) the paint can (6 Fish. 268) the bottle stopper (5 Fish. 531) in the cases above cited, or in the construction of the articles which were the subject of controversy in the remaining cases, in all of which the patents were upheld. Notably, it is difficult to see how it can be contended that there is less invention in Lipman's application of devices to produce a new and useful result, than in the case of the hotel register, where the invention sustained by the learned Judge from whose decision this appeal is taken, consisted in adopting in a hotel register, the device of printing advertisements on the margin of its leaves, or upon interposed leaves, in the same manner as had been previously done in directories. (5 Off. Gaz., 491). In point of value or ingenuity, or, as a happy thought having useful results, the appellant respectfully contends that the Lipman invention is as genuine, and entitled to as meritorious consideration, as those which are habitually upheld by the Courts.

There is nothing in the cases of Stimson *v.* Woodman 10 Wall., 117), Union Paper Collar Co. *v.* Van Deusen (7 Off. Gaz., 919), and Rubber Tip Pencil Co. *v.* Howard (20 Wall., 498), in this Court, or in the early case of Larabee *v.* Cortlan (3 Fish., 5), in the Circuit, which conflicts with the principles which the appellant contends should govern this case.

In Stimson *v.* Woodman (10 Wall., 117), the question decided by the Court arose upon the propriety of a request to charge, which correctly expressed the rule to be applied in that case, necessarily left the facts that governed the application io the jury ;

and the same remark applies to Larabee *v.* Cortlan (3 Fish., 5).

In Rnbber Tip Pencil Co. *v.* Howard (20 Wall. 498), the difficulty was that the patentee had made a claim too broad to be sustained. The patent was, in effect, for "any piece of rubber with a hole in it."

In Union Paper Collar Co. *v.* Van Deusen (7 Off. Gaz., 919) the inventions claimed were instances of mere judgment in the selection of material, or of a purely double use of an old method of folding a collar, with no evidence whatever from which invention might be inferred.

Infringement.

I. The defendant makes a combined implement, which, when finished, is precisely like Lipman's except that the common sheath for part of its length is paper instead of wood, and the interior groove, which contains the rubber, is larger and able to hold a larger piece of erasing material than Lipman's.

The Court below held that Lipman's invention must be limited to making "the *wood* of the pencil holder the single instrumentality in containing and holding both the lead and the eraser, one end thereof being adapted thereto by an enlarged groove to receive the eraser" (fol. 912, p. 507).

That it was no infringement to attach india-rubber to a pencil by securing it thereto by a separate ferule of "whatever material other than a practical extension of the wood of the pencil-sheath" (fol. 913, p. 507).

That "what the defendant is proved to have done, is to sell pencils having a paper tube placed on the end of a pencil, with india-rubber inserted therein."

That such a pencil is not 'constructed and arranged in the manner' set forth in the specification annexed to the Lipman Patent, limited as it must be

by the state of the art and the disclaimer of the patentee" (*id*).

That the fact that "the paper sheath can be cut away as the eraser is worn," does not make it the equivalent of the wooden sheath of Lipman; and that it is not material that the same result is thereby produced, viz.: that in each the sheath of the eraser can be cut away, on the ground that "if the construction is different, the mere producing of the same result does not make the defendant's device an equivalent, where the special construction is the distinguishing and patented feature of the thing patented" (*id.*, fol. 914).

The errors in the above findings, the appellant respectfully submits, are as follows:

1. The whole theory of what is held as to infringement proceeds upon an erroneous and inconsistent construction of Lipman's Patent.

In construing the patent, the word "construction" is used by the learned Circuit Judge as practically synonymous with "process," which it is not. The patent is, therefore, erroneously treated as if it was a patent for a process, instead of being, as it is, a patent for a *product*.

It is assumed that Lipman's invention is simply for a *mode* of attaching pencils and erasers together, in the narrowest sense of the words. It is true that, in a proper and ordinary use of words, Lipman's patent *is* for a mode of attaching pencils and erasers, but the mode or means of accomplishing that attachment is the employment of a substantially continuous holder, composed of material which can be cut away, interior grooves of varying sizes, arranged at opposite ends, the grooves filled with marking material and erasive material respectively, and the whole finished outside, in the manner of an ordinary pencil.

Provided these means are used, to produce substantially Lipman's result, it is wholly immaterial

by what processes, or in what way the *means themselves* are produced.

Provided, for example, a substantially continuous holder is produced, and that holder is composed of a material that can be cut away, it makes no difference whether it is made of wood or paper, or a composition, or whether it is first made in two parts and then put together, or in three or four parts and then put together.

So, too, in respect to the interior grooves, whether they are formed by being in the solid material, or by chiseling the interior side of one-half of a cylinder, and placing the other half upon it, or by bending the material round a former, and drawing the former out, and leaving an empty cavity in its place, is of no moment. The only question is, what is the relative size, and what are the relative positions of the grooves in the completed structure; are they the same in these respects as Lipman's? If so, then they are Lipman's means used to produce Lipman's results.

The case in this respect is the same in principle as Arkell *v.* Hurd Paper Bag Co. (7 Blatch. 429.)

The patent was for a new manufacture, consisting of an improved paper bag.

The bag was made with the upper end soft and flexible, giving it an advantage in closing the mouth of the bag, when the latter was filled. The patent described the manner in which the flexibility was produced. The infringers crimped the upper end of the bags which they made, producing the same result by a different process, for which they held a patent; but the learned Judge *held*, "the improved bag is the *result*. The softening and making flexible at the top are the means by which the improvement is effected. It is this which distinguishes the present case from the principle sought to be invoked from O'Reilly *v.* Morse, (15 How. 62) and cognate cases."

"The language of the claim, I must concede, read by itself alone, is not the best that might be employed,

and it has laid the foundation for the elaborate argument of the defendant's counsel, where he treats the soft ening &c., as the thing patented, and a result, instead of the means of producing the thing patented, namely, the improved bag," but "Taking the whole patent, specification and claim together, the latter is, I think the just construction of the claim, and relieves it from the operation of the cases cited."

This rule fairly applies to the case at bar. Taking Lipman's patent, specification and claim together, the just construction of the claim, is, as has been shown, a claim for a new and improved combined pencil and eraser, and, in the first part of the opinion of the Court below seems to be so construed. The improved combined pencil and eraser is the *result.* The interior grooves of different size, the substantially continuous handle, &c., are the *means* by which the improvement is effected. To treat the process of producing those means as the thing patented, is to mistake the subordinate for the principal thing; and just as the defendants were held infringers in Arkall *v.* Hurd, although they made their bags flexible by a crimping device for which they held a patent, so the defendant, in this case is an infringer, although he makes his enlarged eraser groove, and his continuous handle, by a process of forming a paper tube and making his continuous handle in two parts, and uniting them together, for which process or device, *he* holds a patent.

Many v. Jagger, 1 Blatch, 372.

2. There is error in the statement that the Lipman patent is confined to "the making of the *wood* of the pencil-holder the single instrumentality in containing and holding both the lead and the eraser, one end thereof being adapted thereto by an enlarged groove to receive the eraser." The specification does not justify so narrow a construction. The word "*wood*" is not used in it. The patentee refers to combining the eraser and the lead in the holder of a drawing pencil, and also refers to the capacity of cutting away the holder at either end; but

this only points to a wooden holder because wood is an ordinary material for pencil-holders, and can be cut away. Any holder having the same properties, whether formed of wood or any other material, the equivalent for the purpose in view, answers to the description. The mode of forming the holder is, merely, the preferred mode given by the patentee. The holder, when completed, so as to admit of the same capacity of holding the eraser and the pencil and of being cut away, and so that the holder for the eraser shall be a substantial continuation of the pencil-holder—is the essential feature—not the material of which it is made, or the mode in which it is put together.

The holder of the defendant may be, and probably is, in some respects, an improvement on Lipman's, because paper is less liable to split than wood, and, therefore, permits the surrounding walls of the interior groove or cavity to be thinner, and the groove itself larger, and consequently capable of holding even a larger eraser than Lipman's. But, simply to superadd an improvement to a previous invention, does not give the right to use the invention improved upon. The improvement is subordinate to the original invention. The equivalence of the paper for the wood, is distinctly admitted in the very patent for the paper continuation of the handle, under which the defendant claims to escape infringement. The invention of the substitution of the paper is said to have "the great advantage that the tube enclosing the rubber must be cut away as the rubber wears off, and said rubber can be used up, entirely, in the same manner as the lead, and at the same time the covering of the rubber is not liable to split, as it is if the same is made of wood" (fol. 886, p. 493), precisely the advantage which Lipman's implement has, minus the last feature, which is a mere question of degree, and an improvement. The claim of the defendant's patent is, "a lead pencil having attached to one of its ends a tube of paper, leather, cloth or other tough and flexible material, *forming a*

continuation of the pencil, and containing a piece of india-rubber, which it encloses entirely, or nearly so, so that it must be cut away to expose the rubber for use (fol. 887, p. 494)." This describes Lipman's implement exactly, with certain features added, for its supposed improvement. It may be doubted whether leather or cloth, or any flexible material could be used, with practical success. But that question does not arise. What the defendant has done is to make a holder for the eraser, of inflexible material, that can be cut away, "forming a continuation of the pencil," and making a combined implement, employing every device shown by Lipman as the means for obtaining his useful result.

As the fact is stated succinctly by Mr. Renwick, the complainant's expert, "the case of wood and paper material combined is the equivalent of a wooden case, for the purpose of combining the lead and article of larger section together in one implement, and of permitting fresh portions of the lead or other article to be exposed for use by cutting the one or other end of the case or sheath" (fol 30, p. 16).

The fact that the defendant also claims the protection of a patent for the implements he makes is no answer to the claim for infringement, and is not relevant to that issue.

Blanchard *v.* Putman, 8 Wall, 426.

3. The opinion states that it was competent and lawful for the defendant to attach his eraser by a ferule of "whatever material *other than* a practical extension of the wood of the pencil sheath," the inference from which is that it would *not* be lawful for the defendant to attach his eraser by a ferule of a material with such qualities as would form a practical extension of the wood of the pencil sheath. But, it being admitted, as it must be and is admitted, that the paper, so far as its function in the combined implement is concerned, has the only quality necessary to constitute it the equivalent for wood, it is difficult

to see why a paper ferule containing an eraser, and so attached as to form "a continuation of the pencil" is not an eraser attached by a ferule forming "a practical extension of the wood of the pencil sheath."

4. The statement that the Lipman Patent must be limited by the "state of the art," and his "disclaimer," does not justify the narrow construction of his patent, which has been already criticised.

The state of the art referred to is predicated upon erroneous findings of fact. It is assumed that implements were "made" by attaching to an ordinary wooden pencil a cap of india-rubber, etc., referring to the rejected applications of Joshua Gray, whereas, as has been shown, there is no proof that any such pencils were ever *made.* They were merely imagined.

It is also assumed that the Dunton pencils existed prior to January, 1857, a conclusion which has already been examined at length.

If the evidence is insufficient in law, as it is respectfully submitted it has been shown to be, to support these findings, there is no ground left to support the conclusions drawn from them in the opinion of the learned Judge in the Court below, as to the construction of Lipman's Patent.

The conclusions could not, it is urged, follow, even if the findings were so supported, but, if the result of the examination of the testimony already had, in the course of this argument, is correct, there is nothing whatever from which to argue for the construction against which the appellant contends.

So, too, the disclaimer contained in Lipman's Patent cannot be turned against him, so as to violate the plain intention of the whole specification taken together. The argument seems to be, that, as Lipman's disclaimer must be construed into a disclaimer of mode (= process) of uniting pencils and erasers, therefore his patent must be construed as one for a

mere mode, in the sense of process, or nearly allied thereto.

But Lipman does not disclaim a *mode* in this narrow sense. Having been referred to Gray's rejected application, he interposed his disclaimer simply to avoid the objection of the Patent Office, and what he disclaimed was not a process of attaching pencils and erasers, but "the *use* of a leadpencil with a piece of india-rubber, or other erasive material, attached at one end for the purpose of erasing marks," *i. e.*, he did not claim the use of a pencil having such attachment, as an eraser, without regard to the structure or peculiarities of the implement; but he claimed a peculiar kind of such implement, "the whole being constructed and arranged" according to his plan. He especially wished to disclaim mere attachments of inefficient bits of rubber to the end of a pencil—the unsuccessful form in which such implements had before been made, and to claim what was less the attachment of a piece of eraser to a pencil than a compound implement, having the holder like a pencil, and containing within that holder the suitable materials, so enclosed, shaped and arranged as to form an eraser or pencil as occasion might require.

To give the disclaimer the effect allowed to it in the Court below, violates the rule of liberal construction applicable to all patents.

Klein *v.* Russel, 19 Wall, 466.
Hamilton *v.* Ives, 6 Fish, 244.

5. It is further stated in the opinion that "if the construction is different, the mere producing of the same result does not make the defendant's device an equivalent, when the special construction is the distinguishing and patentable feature of the thing patented" (fol. 914, p. 507). But what is "special construction" used in reference to a Combined implement like that described in Lipman's Patent; it is that *part* of the construction which gives to the article its special advantages—

the peculiarities upon which the utility which is claimed for it depends. But *that* part of the construction in this instance, consists in simply bringing together, in certain relations of position to each other a holder, interior grooves, etc., holder and grooves having a certain relative size and form. It is shaping into a given form and arrangement *any* suitable materials, by any suitable methods, tools or manner of working. If the "special construction" of a brick wall is in question, reference is had to the way in which the bricks and mortar comprising it are put together, not to the way the mortar is mixed, or the clay treated, to make the bricks, or, if the special construction of the wall is spoken of, with reference to some peculiarity of shape or arrangement, as to its coping etc., "special construction," has no longer reference to the bricks and mortar composing the coping, but to the form, position, etc., of the coping itself, with reference to the whole wall, and if the coping fulfills conditions of the special construction in these respects, it is not material whether the bricks and mortar comprising it are put together in one way or in another, or whether some other material is subsituted for bricks and mortar.

6. The foregoing views are sustained by authority.

Welling *v.* Rubber, &c. Co., 7 Off. Gaz., 606.
Young *v.* Lipman, 5 Fish., 230, 234.
Arkell *v* J. M. Hurd &c. Co., 7. Blatch., 475.
Curtis on Pat., §, 312.

Mr. Curtis says in the section cited:

"When the subject-matter of the patent is a manufacture, the same test of substantial identity is to be applied. * * * If he has taken the same plan and applied it to the same purpose, nothwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee."

In Welling *v.* Rubber, &c., Harness Company, (7 Off. Gaz., 606). The nature of the invention was to produce a substitute for ivory martingale rings, and consisted "in the employment of a metallic ring, within a ring, formed of artificial ivory or similar materials, for giving strength to same." A process was described of surrounding the interior metallic ring with a composition of artificial ivory, and the claim was, "the ring for martingales, &c., manufactured as set forth, with a metal ring enveloped in composition, as and for the purposes specified."

The defendants made rings having an interior metal ring, and an outer covering of vulcanized rubber, which rubber-covered rings were manufactured under several Letters Patent granted therefor.

The same claim against infringement was made in that suit, and upon the same ground as that which, in this case, prevailed in the Court below, but the Court held otherwise, saying:

"It will be perceived that the only change made by the defendant's patent is the substitution of a plastic composition known as rubber or gutta-percha, which necessitates the additional process of vulcanization for the plastic composition called factitious ivory; not the same substance, indeed, as to its essence and constituents, but a similar material in regard to its capability of being adapted to the purpose for which the former is used."

* * * *

"The claim of the complainant's patent fairly construed, is not to be limited to the use of factitious ivory; it is broad enough to include the composition of rubber or gutta-percha" and a decree was ordered for the complainants.

U. S. Circuit (N. J.) Welling *v.* Rubber &c Co., 7 Off.Gaz. 606

The foregoing authority, it is submitted, is directly in point, in regard to the legal effect of the substitution of the paper tube of the defendant for the wooden tube or casing of Lipman.

The Reckendorfer Patent.

This patent is for an improvement upon the Lipman implement.

The latter is of equal size throughout. As a consequence there is a limit to the size of the rubber, which it can contain: if the rubber is increased too much beyond the size of the lead, the walls of the surrounding handle will be weakened so that they will be liable to break or split.

Reckendorfer's invention provides one way of remedying this defect, and consists in making the holder of tapering form, so that it is enlarged at its head, which is received or grooved to contain the rubber or other article of larger diameter than the lead, and gradually tapers towards its opposite end.

The claim is for such a pencil "composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article, as shown and set forth" (fol. 81 p. 43).

It appears, from the evidence, that sundry devices were tried by different persons to accomplish the same result. Lipman, himself, some months prior to 1862, desired an enlarged wooden sheath joined to the rest of the holder, so as to form a shoulder at the point of juncture. A specimen of this device is in evidence (defendants Ex. G. G., fol. 508, p. 286). It is perfectly plain, from near inspection, that the device is impracticable.

1. The difficulty of making a holder of such a shape is obvious. To cut it out in pieces, continuous, for its whole length, would require some contrivance to get around the shoulder, and to make the holder in two parts, of different lengths, would require some contrivance for fastening their ends together. It would be hard to suggest a simple and effective contrivance for either purpose.

2. The liability to break at the shoulder, in such an implement, is perceptible at a glance. The use

of the eraser part brings a transverse strain directly where the shoulder rises from the rest of the holder, and where the implement is least able to bear such a strain.

3. The shape is awkward and inconvenient.

The impracticability of the device is sufficiently attested by the facts that Lipman nevermade but one specimen of the kind: (fol. 510 p. 287) that he states it was simply "among the experiments" he made, (fol. 511, p. 288) that he did not approve of it, and therefore abandoned it *i.e.* that style (id.) and that no such implements ever have, and, it is safe to say, never will go into practical use.

The defendant took considerable testimony to prove that the date when Lipman made this device of a bulging head for a piece of rubber of increased size was anterior to Reckendorfer's invention of the device set forth in his patent.

The answer to this is, first, that the evidence in question fails to prove the asserted fact, and second, that it is utterly unimportant when Lipman made the device in question, because it is not the device which Reckendorfer patented, but an impracticable and unsuccessful attempt to achieve the result which Reckendorfer's invention successfully accomplished.

The second point has been already discussed. As to the first, it simply appears that Lipman made the pencil in question some months prior to August, 1862 (fol. 512, p. 289). (He fully explains and corrects a former statement in which an earlier date was mentioned (fol. 512, p. 288), that Reckendorfer produced his pencils, and showed them to others, and explained their interior construction by drawings, as early as December, 1861,, before the holidays (fol. 204, 205, p. 114, 115), and that Lipman's implement was purely an abandoned experiment. Trying it by simply writing with the lead and erasing with the rubbers was insufficient as a test of its capacity for practical use. Its principal defect is want of durability, and until its durability is tried

it cannot be said to have been practically used. The rudest and most ineffective instrument might serve to write a few lines and erase them. The abandonment was not simply an abandonment of its *use*, it was an abandonment for *insufficiency*.

The rules for establishing the anticipation of a patent beyond a reasonable doubt, which have been already examined and discussed, forbid the acceptance of this testimony as sufficient to defeat Reckendorfer's patent. Lipman also used other devices for the same purpose; he tried surrounding the eraser part of the combined implement described in his patent, with metallic rings, while preserving the uniform size of the holder, the object of the rings being to strengthen the wood, and permit the use of a larger piece of rubber (fol. 512, p. 288).

At a later period a patent was granted to one Philip Hufeland for the device of making the eraser walls thinner, by using paper as the material for part of the holder, thus effecting an enlargement of the recess intended to contain the rubber. This is the device, by the use of which, the defendant seeks to justify his infringement.

These facts show that, as the merit of Lipman's invention became known, attention was called to the advantage to be gained by adding thereto an improvement which would increase the size, and, consequently, the efficacy of the eraser, while preserving all the features and peculiar excellencies of the original invention. That, in pursuit of that object, various devices were attempted. That all these devices previous to Reckendorfer's were unsuccessful, and that, since his invention, still another mode of accomplishing the same object has been devised.

Reckendorfer's invention is very simple, but perfectly effective. It consists in giving the common holder a tapering form. In that way sufficient size and strength is given to the eraser. There is no weakening of the holder in any part, as in the device of the bulging head. The increase of size and

change of form, so far from impeding the use of the whole implement, or interfering with the efficacy of the pencil part; add to the convenience of the whole, and give a form to the sheath of the pencil which is a positive advantage in use; the slight additional weight at the head makes it slightly easier to handle when the pencil end is brought in requisition.

Here, as in the case of the Lipman Patent, the invention consisted in the perception of the application to this implement of the device of tapering the form, as an efficient means of accomplishing an object which nobody before thought of, although those skilled in the art were endeavoring to find some way in which the result might be reached.

The criticism upon the invention, in the opinion of the Court below, is first, that "it would be absurd to say that making one end of a leadpencil larger than the other would be patentable;" but, secondly, that if it were patentable such pencils were not new, but were made before Reckendorfer's invention, for the purpose of using the larger end to receive a cylindrical tube as a pen-holder, and Lipman also made pencils with an enlarged end to hold the eraser, and, that in view of these facts, there is little that can be called invention in Reckendorfer's form of the uniform taper with the recessed head. The conclusion is drawn, as in regard to the Lipman Patent, that whether patentable or not, Reckendorfer's invention must be confined to a wooden sheath, and the implements made by the defendant in which the tapering form is used in the same way, for the purpose of affording a still greater enlargement for the receptacle for the rubber, but in which the holder, made partly of paper and partly of wood, is employed, do not infringe Reckendorfer's Patent, for the same reasons which have been discussed in respect to Lipman's.

To this it is replied:

First—That a sample of the article referred to as a specimen of making a leadpencil with one end larger

than the other is in evidence, and is marked "Defendant's Exhibit U." It scarcely answers to the description of a leadpencil with one end made larger than the other. It is rather a pen-holder with one end made smaller than the other, an ordinary form of that article, and the small end of the pen-holder is made into a leadpencil. It does not exhibit Reckendorfer's device. The tapering form is a mere incident of the pen-holder; it is not given as a means of accomplishing a result, the same, or even analogous, to that accomplished by Reckendorfer's modification of the form of the combined pencil and eraser; the shape of the pen-holder was given to it, merely to save material, and make it as light and slender as possible; the shape of the pen-holder was old and had nothing to do with the use of the implement (which it may be noticed was made after Lipman's invention), as a combined implement; the tapering form was not given as a means of increasing the capacity of one end of the holder to contain within itself an eraser of larger section than the pencil, and the mere accidental presence of a peculiarity in an article, when the utility of that peculiarity for accomplishing a new and different purpose, has not been perceived or thought of, does not present a patent for the new application, when the latter is discovered and made (Muntz *v.* Foster, 2 Web. Pat. Cas., 96-103; Curt. on Pat., p. 64, 4th ed.)

So far as the device for increasing the size of the groove or receptacle for holding the rubber, consisting of the bulging head and shoulder made by Lipman, it has already been shown that that was a mere abandoned experiment.

Secondly.—The proposition that it would be absurd to say, that making one end of a leadpencil larger than the other, would be patentable, may be true in one sense, and yet not applicable to the case under consideration.

If no object is to be gained by such enlargement, or if the enlargement were a *mere* alteration of

form and nothing more, there would certainly be no invention in making it; but if the enlargement was not merely a change of form, but a device leading to a novel and useful result, and the production of an article containing a distinct and useful improvement, then such alteration constitutes a patentable novelty.

Such was the character of Reckendorfer's invention. By means of the alteration in the form of the sheath, he obtained a new and useful result, viz.: an improvement by which the efficacy of the eraser part of Lipman's implement was increased. He was the first to obtain this result, and he obtained it after others had experimented and failed. His means were effective and simple. He avoided the necessity for any metallic rings or separate device for strengthening the material of the holder. His method gives economy and simplicity of construction He produced a new and useful *effect* by his new form.

The principle applies that there is something more in his device than a *mere* change of form. *When a change of form confers structural advantages, it is the proper subject of a patent.*

Davis *v.* Palmer, 2 Brock., 310.
Ex parte Barton, 1 Off. Gaz. 329.
Ex parte J. C. White, id. 163.
Matter of Sturtevant, 5 Off. Gaz., 2.

In the first case, Chief Justice Marshall, commenting on the clause in the old Statute as to "simply changing the form," &c (which was merely declaratory of a still existing rule) says:

"In construing this provision, the word 'simply' has, we think, great influence; it is not every change of form and proportion which is declared to be no discovery, but that which is simply a change of form and proportion, and nothing more. If by changing the form and proportion, a *new effect* is produced, there is not simply a change of form and proportion, but a *change of principle* also." (Davis *v.* Palmer, 2 Brock. 310).

This new effect has been tested and proved in the same way as the result of Lipman's invention was proved, and its usefulness demonstrated by the success of the articles made in accordance with the invention.

The addition of the Reckendorfer improvement has extended the usefulness of the Lipman instrument, and given an increased benefit to the public.

INFRINGEMENT.

The same course of reasoning which was applied to Lipman's invention, with reference to infringement, holds good as to Reckendorfer's.

It is seen that by the device of changing the form, Reckendorfer was enabled to enlarge the diameter of the eraser, and still preserve the features and advantages of Lipman's invention. The defendant, by the use of paper instead of wood, accomplished the same result; and so far as the result is due to the use of paper, there is, of course, no infringement of the Reckendorfer Patent. But the defendant did more; he superadded the Reckendorfer improvement to his own. In one kind of combined pencils and erasers which he has made, he adopts the pencil change of form devised by Reckendorfer, to produce the same effect, and to enable him to encase a rubber in his compound implements, of a much larger diameter than that contained in his improved Lipman pencils, as the latter is larger than that shown in Lipman's original invention. The defendant's tapering pencil is made in evident imitation of Reckendorfer's, and has all of the characteristic advantages of the latter secured by the same means. The same difference exists between the two, in regard to the mere process of construction and the use of paper for part of the holder, as exists in the case of the Lipman Patent; and the same argument applies, and need not be repeated.

Conclusion.

In this case, Lipman's invention was assigned for a valuable consideration to the complainant. By the exercise of energy, and the addition of his own inventive skill to the improvement of the implement which Lipman originated, he created a new industry, and finally built up a trade of wide extent, and great value. Upon the expiration of the first term of the Lipman Patent, it was extended, against the opposition of the defendant, and upon the judicial decision of the Patent Office, that the invention for which it was granted is one of peculiar merit. The defendant then, suddenly, puts upon the market an article which, in every feature that gives the original invention its distinguishing value, is identical with it. The valuable property which the complainant supposed to be secured to him by a grant from the Government, and which he had enhanced by his own energy and skill, is, as soon as its value is fully demonstrated, appropriated by another. If the proper and legal construction of the law, inexorably leads to the conclusion, that, in this, the complainant has suffered no legal injury, there is, indeed, no remedy. No direct argument can be founded upon mere hardship, but the facts of the case may at least, suggest the consideration, that a conclusion working a practical injustice, while founded upon refined distinctions, may justly be, for these reasons, regarded with some suspicion, and adopted only after a careful scrutiny.

It is respectfully submitted that, for the reasons heretofore assigned, the decree appealed from is erroneous and should be reversed.

EDMUND WETMORE,
of Counsel for Complainant.

Supreme Court of the United States.

RECKENDORFER,

Appellant.

vs.

FABER,

Appellee.

BRIEF FOR APPELLANT

BY

CHARLES F. BLAKE.

New York:
John Polhemus, Printer, 102 Nassau Street.

Supreme Court of the U. S.

JOSEPH RECKENDORFER,
Appellant,

vs.

EBERHARD FABER,
Appellee.

ARGUMENT FOR APPELLANT.

The defence sets up in the answer:

1. The invalidity of the Reckendorfer Reissue.
2. Want of novelty of both the Lipman and the Reckendorfer inventions.

In the opinion of Judge Woodruff, and in the brief of the defendants, a defense styled "want of patentability" is also set up. We insist that such a defense, as distinct from want of novelty is unknown to the patent law. In other words, we claim that a patent granted by the Commissioner cannot be assailed for want of invention, except so far as the thing claimed has already been anticipated by others, who are duly set up in the answer.

The Lipman Patent was granted in 1858, under the Act of 1836, and the provisions of that Statute must determine its validity.

The Statute defines the conditions upon which a patent shall be granted. When the formal requisitions of the Act have been complied with, the Commissioner examines the application, and if he does not find that the invention has been antici-

pated, and if he *does* find the invention "sufficiently useful and important," he must grant the patent. The Commissioner then passes on three questions.

1. Did the applicant himself make the invention?

This question is settled by his oath.

2. Was the invention new?

This question is solved by the examination required by the Act.

3. Is the invention sufficiently useful and important?

This the Commissiner settles for himself affirmatively, by the use of his own judgment.

The question of novelty is then a question of evidence and investigation.

The question of patentability, is a question of official judgment.

No patent has ever been held void for want of patentable quality as distinguishable from want of novelty.

Blanchard *v.* Warner, 1 Blatch., 278, and Curtis p. 40, is merely an instruction to the jury, in construing the patent that certain things are not part of the invention. NELSON, J.

In charging the jury in Parkhouse *v.* Kinsman, 1 Blatch, 497, NELSON J. held that the change of the form of the teeth was not a change from the construction described in the patent.

McCormick *v.* Seymour, 2 Blatch. 246, on the question of infringement, NELSON, *J.*, charged the jury that a mere change of form did not avoid the patent.

In Foster *v.* Moore on the question of infringement, CURTIS, J., ruled the same point. 1 Curtis 291.

Ransom *v.* The Mayor, &c., 1 Fish. 264, leaves it to the jury to decide whether the device claimed required invention. The special matter pleaded is not in the report.

In Sickels *v.* Borden, 3 Blatch., 538, it is stated *arguendo* by the Court that new idea is not the subject for a patent.

The doctrine of double use in ~~Thompson~~ Stimpson v. Woodman, is merely another way of stating that the thing claimed had been previously invented. 10 Wall. 117.

The doctrine of aggregation is only another way of stating that the old things claimed in combination are the same functionally and in structure in the combination, that they were out of it.

Hicks *v.* Kelsey, where the defense was that the patent was void in being only for the substitution of a known material for another, was decided by this Court on the ground of want of novelty. 18 Wall. 670

Rubber Tip Co. *v.* Howard, 20 Wall., 498, was decided on the same ground.

3. Seymour *v.* Osborn, 11 Wall., 516. decides that beyond the limits of the Statute defenses the Court is bound by the decision of the Commissioner, in all matters within hisjurisdiction; and the question of the importance andusefulness of an invention is affirmatively committedto him after he has ascertained that the invention is new.

In order then to hold our patents void, the Court must find the invention claimed in them to have been anticipated by some of the persons or publications set up in the answer.

CHARLES F BLAKE.

IN EQUITY.

Supreme Court of the United States.

No. 215.

JOSEPH RECKENDORFER,

Appellant,

vs.

EBERHARD FABER.

Respondent.

Respondent's Brief.

JOHN S. WASHBURN,

Counsel.

New York:
DE LACY & WILLSON, LAW PRINTERS,
Nos. 99 and 101 William Street.

1876.

Supreme Court of the United States

1

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

2

JOSEPH RECKENDORFER,
Complainant, Appellant,
vs.
EBERHARD FABER,
Defendant, Respondent.

In Equity.

3

RESPONDENT'S BRIEF.

This suit is founded upon the patent of Hymen L. Lipman, dated March 30, 1858, and extended, for a "Combination of Lead Pencil and Eraser," (Complainant's Exhibit No. 5, Record pp. 39–41), and the patent of Joseph Reckendorfer, dated November 4, 1862, as reissued March 1, 1870, (Complainant's Exhibit No. 6, Record, pp. 41–43).

4

A third patent is set forth in the Bill; but, not having been put in evidence, is not in controversy.

Defendant is the owner of a patent granted to Philip Hufeland, dated February 18, 1873, for an "Improvement in Lead Pencils," (Defendant's Exhibit X, Record, pp. 492–494); in accordance with the invention described in which, he made and sold the pencils, of which complain-

5 ant's Exhibits Nos. 2, 3 and 4 are specimens,—all of which are claimed by complainant to infringe said Lipman's patent, and of which, Nos. 3 and 4 are claimed to, also, infringe said Reckendorfer patent.

The Bill charges infringement, and prays an injunction and account.

The answer denies that the respective patentees are the first inventors of the improvements claimed; denies infringement; alleges that said patents are void on various grounds specified, and especially avers prior invention,
6 knowledge and use of the devices in question by various persons named, and that the invention had been in public use and on sale for more than two years prior to the respective applications for said patents.

Upon final hearing, before the Hon. LEWIS B. WOODRUFF, Circuit Judge, at the February Term, 1874, the Bill was dismissed.

7 The questions to be considered upon this appeal are.

First.—That of the construction of the Lipman and Reckendorfer patents.

Second.—That of infringement, with reference to said Exhibits Nos. 2, 3 and 4, and to said Lipman's own disclaimer.

Third.—That of the validity or invalidity of said Lipman and Reckendorfer patents, both as a question of patentability, and of novelty and priority of invention.

8

I. The construction of the Lipman and Reckendorfer patents.

The alleged invention is described in the Lipman patent as follows:—

"I make a lead pencil in the usual manner, reserving

about one fourth of the length, in which I make a groove 9
of suitable size (A), and insert in this groove a piece of prepared India-rubber (or other erasive substance), secured to said pencil by being glued at one edge. The pencil is then finished in the usual manner, so that on cutting on one end thereof you have the lead (B), and on cutting the other end you expose a small piece of India-rubber (C) ready for use, and particularly valuable for removing or erasing lines, figures, &c., and not subject to be soiled or mislaid on the table or desk."

Having thus described the invention, Lipman states 10
and claims as follows :—

"I do not claim the use of a lead pencil with a piece of India-rubber or other erasing material attached at one end for the purpose of erasing marks; but what I do claim as my invention, and desire to secure by letters patent, is the combination of the lead and India-rubber, or other erasing substance, in the holder of a drawing pencil, the whole being constructed and arranged substantially in the manner and for the purposes set forth."

11

The alleged improvement is described in the Reckendorfer patent as follows :—

"My invention is intended to provide a means whereby articles of a greater size or diameter than the lead may be securely held in the head of a pencil of otherwise ordinary or suitable construction, without making the body of the pencil cumbrous or inconvenient. To this end my invention consists:

"*First.*—Of a pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and re- 12
cessed, to constitute a receptacle for an eraser, or other similar article, as hereinafter stated.

"*Second.*—Of a pencil, the wooden case of which gradually tapers from the enlarged and recessed head toward its opposite end for the whole or a portion of the length, as hereinafter set forth.

"The receptacle for the eraser or other article is formed in the head, without too much weakening the wood,

13 owing to the form of the sheath, while for the same reason the end of the pencil which contains the ordinary lead is not cumbrous nor clumsy, but can be readily held between the fingers, just as an ordinary pencil is."

And the farther description shows, that the groove, in which the eraser is inserted, is to be larger than the groove in which the lead is placed.

It is farther stated in the specifications, that "pencils of equal size throughout have been heretofore made
14 with a slip of rubber fitted in in place of the lead at one end, but such pencils have not become of any considerable practical importance, in consequence of the smallness of the rubber, and it has been held impracticable to make the rubber much larger without too much weakening the wood or making the entire pencil thick and awkward to handle. By my invention, the size of the rubber may be so increased, while that of the lead remains the same, as to render it a very effective eraser, the size of the pencil head being such as to
15 render it a convenient receptacle for a rubber of much more considerable size or diameter than the lead."

Having thus described his invention, Reckendorfer claims,—

"1st—A pencil composed of a wooden sheath and lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser, or other similar article, as shown and set forth.

"2d—A pencil, the wooden case of which gradually tapers from its enlarged and recessed head towards its
16 opposite end for the whole or a portion of its length, substantially as shown and described."

Complainant's experts construe the Lipman and Reckendorfer patents, as follows :—

H. B. Renwick, in answer to Q. 3 (Record, p. 37), says, "That patent (Lipman's) describes a pencil composed of lead, of wood, and of india-rubber; the lead

and india-rubber being contained in the groove or bore 17
of the pencil; the lead, as usual, appearing at one end of the pencil, and the rubber being so applied that it shall appear at the other end. It is stated in the patent that, owing to this construction, the india-rubber may have new portions of its surface exposed by cutting away the wood in a manner similar to the sharpening of an ordinary pencil." * * *

"The patent of Reckendorfer, as I understand it, describes, among other things, an improvement upon that granted to Lipman. It describes the wooden case, the 18
lead supported in a groove at one end thereof, and the rubber supported in a similar way at the other end. The improvement consists in making the case of the pencil tapering from the end containing the rubber to that containing the lead, and making the groove for the rubber larger than that which contains the lead. By the use of this improvement, a piece of rubber of larger diameter or transverse section can be used than is possible when the pencil is made in exact accordance with the Lipman patent, and at the same time is supported 19
sufficiently firm, while the pencil is not inconveniently increased in size at the point where it is usually grasped by the hand."

And again (Answer to X Q. 7, p. 38):

"I understand the question to ask me, whether the patent (Lipman's) covers any pencil which is not constructed substantially in the manner described in that patent,—that is to say, with a wooden case provided with a groove or bore, with rubber enclosed in *one* end 20
of *the groove* and lead in the *other*. The patent *is* limited to this method of construction, or, as I should phrase it, to this construction of a pencil as a whole."

And being asked (X Q. 11, p. 38), "Then, do you mean to be understood that it is limited to an ordinary lead pencil made in the usual manner, with the only difference, that the *portion of the groove or bore* which is used as the receptacle of the eraser, does not contain

21 lead?" He answers, "I do, to that or a substantial equivalent."

And E. S. Renwick says, (Answer to Q. 5, p. 15), "The said combination, as I understand the contents of the patent (Lipman's), is one of the lead of a pencil and a piece of india-rubber or other erasive substance, with the holder or casing of the pencil, in such manner that the lead is arranged at one end of the said holder or casing, and the india-rubber at the other end thereof,
22 and that a fresh portion of either the lead or the india-rubber may be exposed for use by cutting away the casing." * *

And (p. 16), "The pencil recited in the first claim of said patent (Reckendorfer's), as I understand the same, is composed of a wooden sheath and a lead core, having one end of the sheath enlarged and recessed to constitute a receptacle for an eraser or other similar article of larger section than the lead; and the pencil recited in the second claim of the said patent is a pencil, the
23 wooden case of which gradually tapers from its enlarged and recessed head towards its opposite end (in which the lead core is enclosed), for the whole or a portion of its length."

And (Answer to X. Q. 77, p. 29,) "The thing described in the first claim of Exhibit No. 6, (Reckendorfer's patent) must have one end of the sheath enlarged, whereas, the thing described in Exhibit No. 5 (Lipman's patent), does not necessarily have one end of the sheath larger than the other. The thing described in the second claim of
24 Exhibit No. 6, must have a sheath which tapers from its enlarged end, and recessed head towards its opposite end, for the whole or a portion of its length; whereas, the thing described in the claim of Exhibit No. 5, need not necessarily have a tapering sheath. The thing recited in the claim of Exhibit No. 5 must of necessity have a piece of erasing substance arranged in one end of the sheath, whereas, the thing recited in each of the claims of Exhibit No. 6 need not have a piece of erasing substance arranged in its recessed end."

And (answer to X. Q. 105, p. 34) * * * "As I understand said patent (Reckendorfer's), an essential element of each of the improvements recited in the claims is, that the entire sheath, from end to end, shall be composed of wood, or materials that are the equivalent thereof, so that the sheath or case may be cut away at each end, so as to expose fresh portions of the lead at the lead end of the pencil, and fresh portions of the india-rubber or other article, as required in the use of the pencil." 25

And both complainant's experts admit that pencils precisely like complainant's Exhibits Nos. 2, 3, and 4, except that the tube enclosing the rubber is of metal, instead of a material capable of being easily cut away, differ substantially from what are shown and claimed in the Lipman and Reckendorfer patents respectively. (Record, pp. 34-35, 39.) 26

In brief, then, they consider what is shown and described in the Lipman patent to be a pencil, the case of which is composed of wood or some material capable of being cut away, containing a groove, in one end of which is the lead, and in the other end the india-rubber; and that what is shown and described in the Reckendorfer patent is the same, with the addition, that the groove for the rubber is made larger than that which contains the lead, so as to admit of a larger section of rubber, and that the wooden case is made to taper from its enlarged rubber end. 27

The purpose of both is to enable either end to be cut away, so as to expose fresh surfaces of the lead or the rubber as required; and the Reckendorfer patent has the additional purpose of enabling a larger section of rubber to be inserted. 28

Defendant's expert, A. Faber du Faur, construes what is shown and deseribed in said patents, as follows (Record, p. 292.):

"I find in Exhibit No. 5 (Lipman's patent), the aggregation of two tools or instruments in a common handle,

29 viz., of a lead pencil and an india-rubber. I call it an aggregation, because there is no reciprocal action or operation of the two instrumentalities, and because the action of neither of them is modified by being united in a common handle. The method shown and described of uniting the two instruments is to make a pencil in the usual manner, inserting lead for only about three-fourths of the length, and india-rubber for the remaining one-fourth of the length, the india-rubber being inserted into an enlarged groove. After the lead and india-rubber have
30 been inserted, the pencil is finished in the usual manner, by which, I understand, that the two parts or halves are glued together, and any additional finish given if desired. The lead and rubber are exposed for use by cutting in the usual manner. This is the only method which I find described of uniting the two instruments in a common handle.

"In Exhibit 6 (Reckendorfer's patent), I find substantially the same invention as the one shown and described in Exhibit 5, with a change of relative proportions and
31 of form. The rubber in Exhibit 6 is thicker in proportion than the rubber in Exhibit 5, and the sheath is enlarged at the rubber end, so as to have strength enough to hold the thicker rubber. This enlargement of one end of the sheath forms one part of the invention; the other part consists in gradually tapering the wooden case from the enlarged and recessed head toward the opposite end. The method of uniting the two instruments, as shown and described in Exhibit 6, consists of having a wooden casing made in two parts, larger at one end than at the other, the two parts to be glued together in the
32 ordinary manner. The casing has a small groove for the reception of the lead, and the larger groove for the reception of the rubber, or similar article."

It was argued below, by complainant's counsel, that an enlargement of the groove containing the rubber, over that containing the lead was, in fact, the essential feature of Lipman's invention, thus departing from the construc-

tion given by complainant's own experts. This argument was founded upon the slight enlargement appearing in the drawings. 33

There is nothing in the patent to sustain this. In the specification it is stated that the groove in which the india-rubber is inserted is made "of suitable size," but this might allow it to be larger or smaller than, or of the same size as, the part of the groove in which the lead is contained, or it might be varied to fit the pencil for different uses.

34

With reference to this, Judge WOODRUFF says (Record, p. 506), "He inserts india-rubber at one end, in which he makes a groove 'of suitable size.' This is quite indefinite. A suitable size may be large or small; it will depend upon the use to which it is to be applied. But his drawing shows a groove larger than that of the lead."

And complainant's own experts make no such distinction,—on the contrary, Henry B. Renwick says (Answer to Q. 3, p. 37), that the Lipman patent "describes a pencil composed of lead, of wood, and of india-rubber, the lead and india-rubber being contained in the groove or bore of the pencil;" and (Answer to X Q. 7, p. 38,) that it covers a pencil "with a wooden case provided with a groove or bore, with rubber enclosed in one end of the groove and lead in the other. The patent is limited to this construction, or as I should phrase it, to this construction as a whole." And (Answer to X Q. 11, p. 38), being asked if he means to be understood that it is limited to an ordinary lead pencil made in the usual manner, with the only difference, that the portion of the groove or bore which is used as the receptacle of the eraser does not contain lead, he answers, "I do. To that, or a substantial equivalent." 35 36

The language of Lipman's claim and specification shows, not only that such comparative enlargement was neither intended nor understood by the patentee him-

37 self to be a feature of his invention, but, on the contrary, that no fixed measure of the size of the rubber, whether by comparison with the size of the lead, or otherwise, was intended.

And the recent decision of this court, with regard to the patentability of the Blair Patent, in *The Rubber Tip Pencil Company v. Howard et al.*, (20 Wall., 498, S. C. 7 Off. Gaz., 172), is directly in point against such a conclusion being derived from the slight enlargement ap-
38 pearing in the drawings.

In that case, the *form* of the rubber head shown in the drawings was argued to be a feature of the invention. But this court held that it was neither claimed nor described, but, on the contrary, with reference to its *form*, the words "convenient for the purpose" were used,—just as in this case, with reference to *size*, the words "of suitable size" are used,—and overruled the argument.

There is, moreover, *proof* that such enlargement of
39 the rubber groove was not considered by Lipman himself a feature of his invention.

One of Lipman's original pencils, marked "Patent applied for," is put in evidence (Defendant's Exhibit B, Record, p. 34), in which there is very slight, if any, enlargement of that part of the groove containing the rubber, certainly not enough to make any patentable difference.

Comparing this with Complainant's Exhibit, Hirsch No. 6, which is stated to have been made by complain-
40 ant "about a year ago," (Record, p. 122), the difference in the size of the rubber groove is apparent, and that such enlargement is of recent adoption by complainant himself.

It is submitted, that what is shown and described in the Lipman patent is merely the aggregation in the wooden holder of a drawing pencil made in the usual manner, at the respective ends of the central groove

thereof, of the marker of lead and eraser of india- 41
rubber, or other erasing material, and even such aggregation is subject to his disclaimer,—and that what is shown and described in the Reckendorfer patent is the same, with a change of relative proportions and of form, the wooden sheath being enlarged at the rubber end to admit of a receptacle for the insertion of a larger section of rubber, and the pencil made tapering therefrom toward the lead end.
42

II.—Infringement.

1. As respects the alleged invention shown and described in both the Lipman and Reckendorfer patents. 43

The charge of infringement is placed by complainant, and depends wholly upon establishing the substantial similarity of Complainant's Exhibits, Nos. 2, 3 and 4, to what is claimed and shown in complainant's said patents.

These exhibits are made according to the invention shown and described in the patent of Philip Hufeland (Defendant's Exhibit X, Record, pp. 492–494), owned by 44
defendant, the claim of which is as follows :—

"A lead pencil, having attached to one of its ends a tube of paper, leather, cloth, or other tough and flexible material, forming a continuation of the pencil, and containing a piece of india-rubber, which it encloses entirely, or nearly so, so that it must be cut away to expose the rubber for use, substantially in the manner herein shown and described."

It is clear, not only that such pencils are not sub- 45
stantially similar to what is shown and described in said Lipman and Reckendorfer patents, but that they are really included in and covered by Lipman's own disclaimer, which is in these words, "I do not claim

46 the use of a lead pencil with a piece of india-rubber or other erasive material attached at one end for the purpose of erasing marks."

This disclaimer cannot be restricted. It is, broadly, of the use of a lead pencil with an eraser attached at one end, in any way and by any device.

Complainant's experts—construing the Lipman patent to claim and show a pencil whose case is composed of a material capable of being cut away so as to expose
47 at either end, as required, fresh surfaces of the lead or india-rubber, enclosed in respective portions of the central groove,—and construing the Reckendorfer patent to show the same, and, in addition, to claim and show an enlargement of the rubber over the lead groove, so as to admit of the insertion of a larger section of rubber, and a corresponding change of form,—express their opinion that said Exhibits Nos. 2, 3, and 4 are respectively substantially equivalent, for the reason simply that, with what they consider as a substantially
48 similar arrangement of parts, they, too, have the capability of being cut away so as to expose fresh surfaces of the rubber, (Record, pp. 37, 15–16.)

And both admit that pencils precisely like Exhibits Nos. 2, 3 and 4, except that the tube enclosing the india-rubber is of a material *not* capable of being easily cut away, are not the equivalent of what is sworn and described in the Lipman and Reckendorfer patents, but, if of a material capable of being easily cut away, are of opinion that they *would* be such equivalent, (pp. 34–35, 39).

49 It is submitted, that such an application of the doctrine of equivalents would restrict Lipman's disclaimer to only such methods of attachment as should *not* secure the results *he* claims to have secured, and this, although they are secured by independent devices of the very class he has specifically disclaimed.

Lipman's original claim was for "the combination in one pencil of both lead and india-rubber, or other erasive

substance." His application was rejected, upon reference 50
to the prior application of Joshua Gray (Defendant's Exhibit A., Record, p. 487). He then amended his claim as it now reads, and inserted his said disclaimer of a pencil with an eraser "attached at one end," in any manner.

Gray, in his application thus referred to, showed and described the attachment of a piece of india-rubber enclosed in a "holder or cap,"—not limited as to the material of which it was to be composed,—to the end of a lead pencil. (Defendant's Exhibit R. Record, pp. 491–492). 51

If Hufeland's attachment of a piece of india-rubber, enclosed in a paper tube to the end of a lead pencil, by means of a tenon, be not, as well as Gray's attachment, covered by Lipman's disclaimer,—that disclaimer amounts to nothing.

But, as matter of *fact*, there is a wide difference between Hufeland's said pencils and what is shown and described in complainant's said patents.

Lipman was compelled by the then state of the art to restrict his claim within narrow limits, and, therefore, 52
claimed only the combination, or, more properly, the *mere aggregation* of the lead and rubber "in the holder of a drawing pencil," which was "made in the usual manner," —and his method of doing this was by inserting in a portion of the central groove of the pencil a piece of rubber "secured to said pencil by being glued at one edge."

Hufeland made no alteration in the pencil, he simply attached the rubber, enclosed in a paper tube, to one end of the whole pencil; the construction of which tube is in no respect like that of the holder of a pencil—"made in the 53
usual manner,"—*i. e.*, in two longitudinal parts, glued together.

Nor is this paper tube in any proper sense a *continuation* of the pencil, or of the central groove of the pencil, nor a part of the "holder of a drawing pencil." The attachment may be entirely detached from the pencil, and the complete pencil would still remain. And although the tube, likewise, as a property of the material of which it is

54 composed, viz., paper, has the capability of being cut away, that certainly cannot make the two things substantially similar, which, in their construction and manner of operation, are substantially different.

2. As respects the alleged additional invention shown and claimed in the Reckendorfer patent, the attachment of a paper tube enclosing the rubber at one end of a *tapering* pencil (which was old), is, as compared with
55 Reckendorfer, as much an independent device as its attachment at one end of a *cylindrical* pencil is, as compared with Lipman; and Reckendorfer is equally bound by Lipman's disclaimer.

The only difference between Exhibit No. 2 and Exhibits Nos. 3 and 4, is, that, as a *tapering* lead pencil admits of a *larger base* at its end, a *larger* paper tube with a correspondingly *larger* section of rubber enclosed may for that reason be attached. But, except in *size*, the paper tube is not changed. It is still the same *cylindrical* tube,
56 only a larger one."

Therefore, Commissioner LEGGETT refused to grant to Hufeland a *separate* patent for the attachment to a pencil of *tapering* form, saying,—(1 Off. Gaz., 278).

"It is not seen upon what ground the man who proves himself the first inventor of the device of the paper ferrule can be debarred from using it upon any form of pencil upon which it would be capable of use, without the exercise of further invention."

57

Finally, the grounds upon which Judge WOODRUFF's emphatic decision, that the Hufeland pencils (Exhibits Nos. 2, 3 and 4) are *not* substantially similar to, or any infringement of, said Lipman and Reckendorfer patents, is placed (Record, p. 507), are unanswerable, as follows:

"In view of the state of the art, and the disclaimer in the patent (Lipman), it cannot be construed as including a separate and distinct mode of securing the eraser to the

end of the pencil." * * * "What the defendant is proved 58
to have done is to sell pencils having a paper tube placed on the end of a pencil, with india-rubber inserted therein. This is not a pencil "constructed and arranged in the manner" set forth in the specification annexed to the Lipman patent, limited as it must be by the state of the art and the disclaimer of the patentee. In the Lipman pencil, the device for holding the lead of the pencil and the eraser is single, and is definitely so described, with an exclusion of other modes of attaching the eraser to the pencil holder. In the defendant's pencil, the 59
pencil-holder does not contain the eraser, but such eraser is attached and secured to the holder by other distinct means; the device for holding the lead and the eraser is double and complex, and to say that it is constructed substantially in the manner set forth in Lipman's specification seems to me impossible.

"It is argued that, because the paper sheath can be cut away as the eraser is worn, it should be deemed an equivalent to the wood enclosing the eraser in the Lipman pencil. 60

"I am not willing to relax at all the just protection due to inventors against a merely evasive substitution of equivalents. But it will be seen that the present patent, if valid, is not broadly for a combination of lead, a holder and an eraser, nor even for a lead and an eraser in the same sheath; it cannot be sustained, except for a special construction of the containing holder, and that is not adopted by the defendant.

"For the same reason, it is not material that in one respect the same result is produced, viz., that in each 61
the sheath of the eraser can be cut away. If the construction is different, the mere producing of the same result does not make the defendant's device an equivalent where the special construction is the distinguishing and patented feature of the thing patented.

"My conclusion is, therefore, that if the Lipman patent can be sustained at all, its true construction is so limited by the state of the art and the disclaimer of the

62 of the patentee, that the defendant's pencil is no infringement.

"The Reckendorfer patent is based upon that granted to Lipman, or rather it is applied to pencils constructed in like manner, so that if the defendant does not infringe the one he does not the other."

It is submitted that the charge of infringement is not only not sustained, but disproved in every respect.

63

III. The validity or invalidity of the Lipman and Reckendorfer patents.

First. As a question of patentability.

I. The Lipman patent:

64

It is submitted that the alleged invention shown in both the Lipman and Reckendorfer patents is not patentable.

As already argued, what is shown and described is merely the aggregation in the wooden holder of a drawing pencil, made in the usual manner, at the respective ends of its central groove, of the marker of lead and eraser of india-rubber, or other erasing material:—in other words, as shown by defendant's expert, (Record, p. 65 292), the aggregation in a common handle of two instruments--a lead pencil and an eraser, without any reciprocal or co-operative action or operation, neither being modified by being so united;—in fact, nothing being accomplished save a convenient juxtaposition.

That such a mere aggregation is not properly a *combination* in the sense of the patent law, nor patentable as such, may be now considered well settled, by adjudications in this Court, in the Circuit Courts, and in the Pa-

tent Office, to which it is only necessary to refer, and in 66
many of which the aggregation involved was analogous, in every respect, to that shown in the present case.

Hailes v. *Van Wormer*, 7 Blatch., 443.
Affirmed by this Court, 5 Off. Gaz., 89.
Sawyer v. *Bixby et al.*, U. S. Circuit Court, Southern District New York, 1 Off. Gaz., 165.
Gallahue et al., v. *Butterfield*, Id., 2 Off. Gaz., 645, 647.
Sarven v. *Hall et al.*, U. S. Circuit Court, 67
District of Connecticut, 1 Off. Gaz., 437.
Dane et al., v. *The Chicago Manufacturing Co.*, U. S. Supreme Court, 7 Off. Gaz., 924, 926.
Stimson v. *Woodman*, 10 Wall., 117.
Bean v. *Smallwood*, 2 Story, 408.
Inman v. *R. R. Co.*, Id., 412.
Hotchkiss v. *Greenwood*, 11 How., 248.
Ex parte, Van Wagenen, Com. Dec., 1 Off. Gaz., 89. 68
Monce v. *Adams*, Id., Id. 1.
Ex parte, Prindle, Id., Id. 404, 405.
Ex parte, La Due, Id., Id. 549.
Morse's Appeal, Id., 3 Id., 468.
Baker's Appeal, Id., 4 Id. 156.
Castle's Appeal, Id., Id. 179.

In accordance with these decisions, many of which he cites, and fully, it is submitted, sustained by them, Judge 69
WOODRUFF said, with reference to this objection to complainant's patents (Record, pp. 508–509).

* * * "what, then, did Lipman invent?

"There was the pencil and here was the eraser, each had its own holder or sheath. If he had spliced the two together for convenience in use, tying them with cord, or fastening them with glue, would that have been a patentable invention?

70 "Would the man who first put the two blades of a knive in one handle, instead of one only, be an inventor? And would he be any more so if one of the blades was a file, such file blades having been in common use in a like separate handle?

"If, to attain the utility and convenience which the union of two implements produces, something new in construction of the implements, or some new device requiring thought or study (more or less) is necessary to unite them, such union may be patentable. But here each implement is constructed precisely as it was before, and the means of union was not in itself novel. It was like inserting two awls of different sizes or uses in one handle; or like the recent case before the Commissioner of Patents, in which the alleged invention consisted in uniting a putty-knife and a glass-cutter in the same handle" (Monce *vs.* Adams,
71 1 Off. Gaz., 1.)

"When the functions and uses of each are unaffected by the union, and the means of uniting has no novelty, it is not obvious, certainly, that anything of invention can be alleged of the combined implements (Sawyer v. Bixby, 9 Blatch., 362).

"That the aggregate result may be very convenient, may for that reason be popular and may find a ready sale, and that such sales are very large, and show a great demand, does not determine the question. As suggested in several cases relating to aggregation as distinguished from patentable combinations, the aggregate result may be the production of a better structure, as an aggregate, than was ever before produced; and yet, for the lack of novelty of
72 device or new result produced by the aggregation, and due thereto, it may have no patentable quality.

(*Hailes* v. *Van Wormer*, 7 Blatch., 443, affirmed in the Supreme Court, 5 Pat. Off. Gaz., 89. *Sawyer* v. *Bixby*, 9 Blatch., 362. *Sarven* v. *Hall*, Id., 524, 539. *Ex parte Van Wagenen*, 1 Pat. Off. Gaz., 89. *Prindle*, Id., 404. *La Duc*, Id., 549. *Monce* v. *Adams*, Id., 1. *Castle*, 4 Id., 179. *Morse*, 3 Id., 468).

"Whether these suggestions must lead to the unquali-

fied declaration of the invalidity of the patents or not, 73
they certainly confirm the point above firstly considered —that if the patents can be sustained, they are limited to the special construction of the pencils specified, and which the defendant does not infringe."

Complainant's counsel below attempted to avoid the manifest conclusion of want of patenability, by arguing,—

1. That this aggregation is to be considered patent- 74
able, because a *convenient* one.

This argument was emphatically pronounced untenable by Judge WOODRUFF, in his language above quoted, and it is plainly, for otherwise, the numerous express adjudications referred to would be practically pointless, for it would be difficult to find any such aggregation by which utility and convenience were not sought, certainly, and generally accomplished.

The very idea of aggregation, and the purpose sought to be affected, is to secure additional practical convenience 75
in use by the *juxtaposition* of separate instrumentalities —not merely physical juxtaposition, but juxtaposition by means which will admit of the practical and convenient *use* of the separate instrumentalities.

In fact, utility is as much the object of, and results from a mere aggregation as, from a veritable combination, but, in the former, it is not a utility derived from the conjoint or cooperative action of the separate instrumentalit es. And the distinction between the two is precisely this;—whether in the compound article, the separate instumentalities re- 76
tain simply their own respective functions—no matter how convenient or economical their juxtapositon may be—or a new joint co-operative operation is produced. The former, whether useful or not, is only mere aggregation, and not the subject of invention ; the latter is a veritable combination.

True, invention may be inferred from great utility and public appreciation, but only when the patent shows a

77 patentable subject-matter to which the utility must be due; for a mere aggregation, or, indeed, what is due only to mechanical skill or good judgment, may be *useful*, but they are not *new* in the sense of *invention*.

Nor is a *result*, derived from such contiguity or juxtaposition of old separate parts,—although convenient, and therefore useful,—a *joint* or *co-operative* action or effect. The very concession of counsel, that the devices are old, and that their separate functions remain the same, un-
78 changed, precludes the idea of any *joint* operation.

And the fact of utility, resulting from the aggregation, is assumed and considered in all the cases, which, notwithstanding, deny its patentability.

2. The principal argument of counsel below, upon the question of patentability, was, however, that the pencil shown and described in complainant's patents is "*an article of manufacture*," and, as such, has a purpose, and there is derived a result from it as a whole, which ren-
79 der it patentable, and take it out of the conditions. applicable to a *machine*.

Even if such an article can be properly termed "an article of manufacture" in the sense of the patent law, which, it is submitted, it cannot, this argument is not a sound one, but rather an attempt to evade the necessary conditions of every invention.

Such an article of manufacture might be produced by a mere convenient aggregation of old things, without any
80 co-operative operation, or even by mechanical skill alone; but, although it had not been produced before, it would not be *new*, or the subject of a patent in the sense of the patent law; the union of two old things, without producing any thing but the same two old things, with their same separate functions, is in no sense a *new* manufacture. Calling such production "a new article of manufacture," when there is no novelty in the process or means of production, and no new result, does not

give it patentable novelty. Nor are any of the require- 81
ments of *invention* dispensed with, because it is presented as a "new article of manufacture." It must have all the requisites of other patentable productions, and give the same evidence of invention.

In *Union Paper Collar Co.* v. *Van Deusen et al.*, 7 Off. Gaz., 919, 922, 923—in this Court, Justice CLIFFORD, delivering the opinion, said:

"Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, 82
machine or composition of matter, for which proposition there is abundant authority in the decisions of this Court," citing

Hotchkiss v. *Greenwood*, 11 How., 265.
Phillips v. *Page*, 24, Id., 167.
Jones v. *Morehead*, 1 Wall., 162.
Stimpson v. *Woodman*, 10 Id., 121.

and farther said:

"Articles of manufacture may be new in the commercial sense, when they are not new in the sense of the patent 83
law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case, that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production," citing

Glue Co. v. *Upton*, 6 Off. Gaz., 840,

which fully discusses and sustains the principle and authorities.

In *Adams' Appeal*, 3 Off. Gaz., 150, Commissioner LEGGETT said, with reference to the phrase, "Article of manufacture:" 84

"A strange hallucination appears to exist in the minds of many as to the effect of these words, and their presence in a claim is supposed, in some miraculous manner, to change the nature of the invention. This is all a mistake. The same rules apply in determining the patentability of an article of manufacture as in any other

85 case—there must be the same evidence of invention, the same proof of novelty."

And see *Draper* v. *Hudson*, SHEPLEY, J., 3 Off. Gaz., 354.
Union Paper Collar Co. v. *Van Deusen et al.*, BLATCHFORD, J., 2 Id., 361.
Jerome's Appeal, Com. Dec., 3 Off. Gaz., 64.
Wattle's Appeal, Id., Id., 291.
Beach's Appeal, Id., Id., 607.

86

It is submitted that there cannot be found, either in the principles of the patent law, or in adjudications, any warrant for such a distinction as counsel argued exists, by which the *conditions* of invention—which ought to be of uniform application — can be dispensed with, with reference to one of the statutory classes of invention, although admitted to be applicable to another.

And it is conclusively adverse to such argument that, in many of the very cases cited in which the doctrine of
87 the non-patentability of such a mere aggregation is laid down, the alleged inventions *were* manufactures.

In relation to this argument, Judge WOODRUFF said, (Record, pp. 504, 505.):

"Some observations made in the progress of the argument suggest the propriety of inquiring, and of stating precisely what it is which these patentees profess by the invention to have improved. It was called in the discussion an "article of manufacture," as distinguished
88 from a machine having operation or action, and in which combined parts may operate reciprocally or conjointly, so as to produce results due to their concurring influences. Without conceding that the distinction stated can, in its application to the subject of these particular patents, have any influence on the inquiry whether any patentable invention is disclosed by the patents, construed in view of the state of the art, and of prior knowledge and use, it is proper to say: The subject of these

patents, though not involving the complication of devices which entitles it to be dignified as a machine, is, nevertheless, a tool or implement to be used or employed to produce useful results, as much so as a pen, a stamp for printing or embossing letters or figures, a hammer or a file. All these are but instruments and mechanical agents, which are to be operated by the skill of the user to effect a purpose. True, they are articles of manufacture, and put on sale; so is almost every description of tool, implement, and other mechanical device, which is of such general utility as to be the subject of general request in the market. 89 90

"If there was a general demand for a particular combination of mechanical devices, it would be manufactured and be found on sale everywhere within the range of such general demand. To call the subjects of these patents articles of manufacture, in likeness to ready-made clothing, or food, or medicine, would not truly represent their character or functions.

"It is a mechanical instrument as much as a penknife, a cork-screw, a wrench, or a screw-driver; and the inquiry into its patentable character is,—does it embody any new device, or combination of devices, producing a new result, or an old result in a different manner?" 91

3. It was farther argued by counsel below, that an enlargement of the part of the groove which contains the rubber is an essential feature of Lipman's invention, and, therefore, that there is something more than a mere aggregation of a lead pencil and eraser. 92

This argument, based solely upon the slight enlargement shown in the *drawing*, and not claimed or described in the specification, and evidently not considered by Lipman himself, or by complainant's own experts, as a feature of his invention,—has been fully referred to, and, it is submitted, answered, in discussing the question of the construction of complainant's patents.

93 It needs only to be added, referring to the fact that Judge WOODRUFF held (Record, p. 506) that, if the patent of Lipman *can* be sustained, it must be limited "to the insertion in the pencil-holder of an erasing substance by means of a groove in such holder of dimension differing from the groove containing the lead. Other modes of attaching india-rubber to the holder are both by the disclaimer and by the proofs excluded",—that he is careful to make it plain, that even, to that slight extent, he did not consider it patentable,—for he prefaces this by saying (p. 506), "What, then, remains which could be the subject of a patent, there being no claim that the materials themselves or the pro-
94 cess of preparation were in any sense new?

"This inquiry will be important to the question, how far the patents held by the complainant have *any* validity."

And lest it might be claimed that he conceded patentability to some extent, because the fact that the charge of infringement could not be sustained against defendant rendered it unnecessary to consider the case further, he conscientiously added (p. 508),

"But I do not wish to be regarded as affirming the validity of the patents relied upon by the complainant," and then proceeded to discuss their patentability, as already quoted, and saying,

"If the pencil was not new, and the eraser was not
95 new, and the combination of the two was not new, was it invention to suggest that theretofore the erasive material thus combined was not large enough for many uses, and thereupon increase its size, when to do so was simply to do what had before been done in separate erasers," concluding (p. 509),

"Whether these suggestions must lead to the unqualified declaration of the invalidity of the patents or not, they certainly confirm the point above firstly considered—that if the patents can be sustained, they are limited to the special construction of the pencils specified, and which the defendant does not infringe."

It is considered pertinent to the question of patent- 96
ability, in the present case, to refer again to the recent decision of this court, in relation to the Blair Patent, (*The Rubber Tip Pencil Company* v. *Howard et al., supra.*)

The article in that case may be considered the converse of that in this. It was a head or cap of india-rubber, into a hole in which the end of the lead pencil is to be inserted, while, in this case, the rubber is in- 97
serted into a hole in the end of the lead pencil—Reckendorfer making a larger hole, for the insertion of a larger piece of rubber, and constructing his pencil accordingly.

II. The Reckendorfer Patent. 98

The preceding arguments and authorities cited, and language of Judge WOODRUFF as to the question of patentability quoted, apply to and establish the non-patentability of the Reckendorfer patent, as well as that of the Lipman patent, so far as their common features are concerned.

As respects the alleged improvements on Lipman, shown and claimed in the Reckendorfer patent, it is 99
submitted that they, too, are not invention, nor patentable.

Complainant's experts, referring to the defect in the Lipman pencil, of its liability to split from leverage while in use, if the rubber were enlarged beyond a limited size, state that this defect was remedied by Reckendorfer, and that *his* improvement consists in his manner of doing this—by enlarging the rubber end so 100
as to admit of the use of a larger section of rubber, and of the walls of the sheath being made sufficiently thick to resist the strain of the leverage in use,—and that, in order to prevent the part containing the lead

101 from being of too large a size, which would render the pencil clumsy, making the pencil-case to taper toward the lead end.

(Testimony of E. S. Renwick, Answers to X QQ. 80, 81, 82, Record, p. 30.)

And Reckendorfer, as already quoted, refers in his specification (Record, p. 43) to the same mechanical difficulty, which he intended, by the manner in which he constructed *his* pencil, to remedy.

102 Simply then, Reckendorfer, knowing of the defect in the Lipman pencil, which, by reason of the weakness of its wooden walls, admitted of the insertion of a comparatively small section of rubber, merely *enlarged* the rubber end of the sheath, so as to allow of a larger hole, and, consequently, of the insertion of a larger piece of rubber;—and, it not being desirable to correspondingly enlarge the lead end,—made the pencil tapering.

It is submitted, that to accomplish just this it would be
103 obvious to any one, that the rubber end needed merely to be enlarged and the pencil to be made tapering, and that these features are merely matters of construction, in no respect requiring the exercise of *invention*, but only of mechanical skill and good judgment, the distinction between which is well settled.

Parkhurst v. *Kinsman*, 1 *Blatch.*, 497.
Teese v. *Phelps*, 1 *McAllis.*, 19.
Ransom v. *Mayor, &c.*, 1 *Fish.*, 252.

104 And merely remedying defects in, or increasing the capacity or degree of operation, without altering its principle, of a previously existing machine, and merely structural changes of form and proportion, are not invention, or patentable as such.

In *Winans* v. *Danforth*, *Law's Am. Dig.*, 423, pl. 33, it was held, NELSON, J., that the remedying of defects in a machine by practical men, is the work of a mechanic,—of the intelligent operator,—and has no connection with invention or discovery.

In *Tatham* v. *Le Roy*, 2 *Blatch.*, 485, it was held, that 105
even where a new effect was produced by a change in a patented machine, in order to render such change the subject of invention, and prevent the new machine from being identical with the old one, it must be a new effect, different *in kind*, and not consist in doing more work in a given time, or with a reduced amount of power.

And, in *Matter of Greeley*, 4 *Off. Gaz.*, 612, Judge SHEPLEY thus stated the rule:

"Structural changes of form and proportion, although they improve the operation and produce a better result, 106
but one of the same kind, are only different and better forms of embodying the same idea, and illustrate the difference between mechanical skill and inventive genius."

And in *Philips* v. *Page*, 24 *How.*, 167, it was held by this COURT, Justice NELSON delivering the opinion, that the *enlargement* of the *organization* of a machine, compared with a former one, does not afford any ground for a patent, in the sense of the patent law.

And 107

Blanchard v. *Beers*, 2 *Blatch.*, 416.
Wheeler v. *The Clipper Mower & Reaper Co.*, 2 *Off. Gaz.*, 442.

And where two machines are substantially the same, and operate in the same manner to produce the same results, although they may differ in form, proportions and utility, they are the same in principle, and the latter one has no other merit than that of being an *improved imitation* of the other, for which no valid patent can be given. 108

Gray v. *James*, *Pet. C. C.*, 397.
Evans v. *Eaton*, 3 *Wash.*, 449.
Brooks v. *Bicknell*, 3 *McLean*, 262

Reckendorfer himself claims to have done nothing more than to remedy the defect in Lipman's pencil, by structural changes of form and proportion, which were intended to effect, and did effect, simply an enlargement of

109 the organization and capacity of the Lipman pencil, and that by the most obvious mechanical devices.

In fact, Lipman's patent, although not claiming as a feature of his invention an enlargement of the rubber groove, contained language which prevented it from being the subject of any other patent, for he described the rubber groove as being made "of suitable size,"—and so far as the tapering form of the pencil is concerned, that is not only a matter merely of form and construction, but
110 it was an old form, and had also been long before used in an analogous combination; for it is in evidence that a tapering lead pencil, having attached to its larger end a metallic penholder, was on sale in the market as early as June or July, 1857, and ever since, a specimen of which is put in evidence (Defendant's Exhibit U), and a list of defendant's own sales of that article until 1862 (Defendant's Exhibit A A, Record, pp. 268, 271).

The adoption by Reckendorfer, therefore, of a tapering lead pencil and insertion of a piece of india-rubber in
111 a hole made in its large end, was only the application to the Lipman pencil of a form of pencil already known.

Nor can Reckendorfer be said to have even successfully remedied the defect alleged in the Lipman pencil, for there is in his own pencil the same liability to split should the diameter of the section of rubber bear the same relative proportion to the diameter of the holder. And that Reckendorfer could use a piece of rubber larger, *in fact*, than Lipman's, although, as compared with the diameter of the holder, relatively smaller, and thereby
112 admitting of enclosing walls relatively thicker, and therefor *less* liable to split, was only matter of construction, to which alone its utility was due.

The claim of Reckendorfer to any additional patentability was decidedly negatived by Judge WOODRUFF, who said (Record, pp. 507,):

"It would be absurd to say, that making one end of a lead-pencil larger than the other would be patentable.

But, if it were patentable, the proofs show that pencils so 113
made were not new, but were made and in use and on public sale before the patent to Reckendorfer, and that such pencils were so made for the purpose of using the larger end to receive a cylindrical tube as a pen-holder, while the other was left conveniently smaller, containing the pencil-lead."

Counsel for complainant below attempted to sustain the patentability of the Reckendorfer patent, also, by ar- 114
guing:

1. That the same defect in the Lipman pencil was remedied by Reckendorfer, in the way shown in his patent, and by Hufeland, by the use of paper, and, therefore, if the Hufeland patent be good, that the Reckendorfer patent must be.

Non sequitur, Reckendorfer attempted to remedy the defect by an obvious mechanical expedient, and his avowed and sole object *was* to remedy it. In every other respect 115
it was still a Lipman pencil, and it is presented as only an improvement upon and tributary to Lipman.

The Hufeland pencil is an independent device,—one of the very class which Lipman *disclaimed*, "a lead-pencil with a piece of india rubber, or other erasing material attached at one end for the purpose of erasing marks." It does not, and *could* not, *possess* the defect which the Lipman pencil had, and which Reckendorfer only measurably remedied. It cannot, therefore, be considered as remedying it: nor can Reckendorfer's pencil be compared with 116
it, in any respect, as a question of patentability. To do so, would be to argue that, because the Reckendorfer patent remedied a defect in the Lipman pencil, it is to be considered to be as patentable as an independent device is, which never had, or could have, such defect.

2. Counsel farther argued that the Reckendorfer patent

117 is patentable, because a new and useful *effect* was produced by his improvement.

This evades the real question.

A new and useful effect may be produced by the exercise of mechanical skill and good judgment. Even an invention may be of little practical value *until* thus modified.

So, in *Barry* v. *Gugenheim*, and *Same* v. *Everett*, in the U. S. Circuit Court, Eastern District of Pennsylvania, 1
118 Off. Gaz., 382, it was held, that, if the essential parts or features of a machine are such as the experience of a mechanic skilled in the art would devise or apply, they cannot be appropriated by a patent, although *essential* in producing the required result.

The question, with reference to the patentability of the Reckendorfer patent, is, whether it required the exercise of *invention* to make a larger hole in the end of the pencil,
119 to hold a larger piece of rubber, and to do so, to, *ex necessitate*, correspondingly increase the size of the end of the pencil, and to avoid such enlargement of the lead part of the pencil,—which was *not* required, and would render it clumsy,—to make the pencil tapering—a tapering pencil being old.

If this constitutes invention, the scope of mechanical skill and intelligence to remedy defects in a previously existing article must be very limited.

But the case of *Wheeler* v. *The Clipper Mower and*
120 *Reaper Co.*, 2 Off. Gaz., 442, in the same Court from which this appeal is taken, is in point to the contrary.

In that case, it was claimed that the machine, as described and shown in the original patent, was not susceptible of being reduced to practical operation, because the socketed piece receiving and holding the cutter-bar at the inner end, though called a "shoe" in the re-issued patents, was not such in fact—it had no toe—and, therefore, could not slide over obstructions,—although a curved toe *was* included in a subsequent re-issue.

Here was a defect claimed to exist of the same general character as that of the Lipman pencil, and claimed to render the patent void by preventing the practical operation of the machine, just as Reckendorfer, referring to the defect in the Lipman pencil, claimed it had prevented such pencils from becoming "of any considerable practical importance," and, in both cases, the *extent* of practical usewas curtailed; (for the Lipman pencil,with the smaller piece of rubber, *could* be used as an eraser, and the mower, even *without* the curved toe, *could* be used on level ground). 121 122

But Judge WOODRUFF said:

"The subsequent addition of the curved toe (which ordinary mechanical judgment would suggest without the aid of invention), as it appears in the patent of 1855, and as complainant's machines appear to have been in fact constructed, was doubtless an improvement (though not a further invention); but the machine would mow upon level prairies or other smooth ground, and upon ground containing only slight elevations and depressions, without the toe." 123

If useful as it was, and extending the practical operation of the mower as it did, the curved toe was nevertheless, not invention, but only an improvement "which ordinary mechanical judgment would suggest without the aid of invention,"--there is still more reason for considering Reckendorfer's invention as no more.

Finally, it is submitted, that both said Lipman and Reckendorfer patents must be considered void, for want of patentability, and that, although the failure of complainant to sustain the charge of infringement by defendant may render it unnecessary, for the decision of this particular case, to decide this question of patentability, the interests of the public will justify, if not demand, such a decision as to the validity of these 124

125 patents, as will prevent their being in future the foundation of such an expensive litigation as the present.

Second :—The validity of complainant's patents, as a question of novelty and priority of invention.

126 I. The state of the art proved shows want of novelty in the sense of the patent law.

Prior to Lipman's alleged invention, there were already known analogous articles, intended in whole or in part for the same or a similar purpose, and operating in a similar manner, and which are not controverted by complainant.

1. September 21, 1852, a patent was granted to
127 Daniel F. Pond for "Pond's Two-Crayon Rubbers," consisting of moulded pieces of india-rubber attached to handles of metal or wood, as shown in the accompanying drawings, in which the rubbers appear to be inserted in the handles—which were used for applying and blending the crayons in bi-chromatic and other kindred styles of drawing (Defendant's Exhibit Q, Record, pp. 489–491) :

2. September 18, 1856, Joshua Gray filed an applica-
128 tion for Letters Patent for an "improvement in pencils, pencil-cases or holders," stated to consist, "in combining with a pencil, or the wooden part or lead carrier thereof, a holder or cap, or the *equivalent* thereof, and a piece of india-rubber or elastic erasive material, whereby the erasure or rubbing out of a pencil line or mark made with the lead of the pointed end of the pencil may be readily effaced, simply by rubbing thereupon the said erasive piece of rubber."

And he claimed: 129

"Combining with a pencil by means substantially as specified—a piece of india-rubber or like material—whereby marks by the pencil may be effaced as set forth."

(Defendant's Exhibit R, Record, pp, 491–492.)

The holder, enclosed in which the eraser was attached by Gray to the end of a pencil, was not limited to material, and, therefore, might or might not have had the incidental property of capability of being easily cut 130 away. Nor is there anything to limit the length or size of this holder, nor the distance the pencil-stock should be inserted into it, and, consequently, the length of the eraser beyond the notched part of the holder, and, therefore, it would not necessarily follow, as argued by counsel below, that if cut away, the rubber would be detached.

It is significant that Lipman's original claim was for "the combination in one pencil of both lead and india-rubber (or other erasive substance)"—and that his ap- 131 plication with this claim was rejected upon reference to this same prior application of Joshua Gray.

(Defendant's Exhibit A, Record, p. 487.)

Being thus rejected, Lipman amended his claim as it now reads, and inserted an express *disclaimer* of a pencil with the eraser "attached at one end" in any manner. It is evident that he thus meant to disclaim precisely what Gray meant, and he understood him to mean to claim, viz., a lead pencil with an eraser fixed to its upper end. 132

Therefore, to avoid Gray, Lipman limited his claim to the "combination of the lead and india-rubber or other erasing substance, *in the holder* of a drawing pencil."

But, in fact, he really shows one method of precisely what he disclaims,—the attachment of the rubber at one end of the lead pencil, by inserting it into it, and securing it by gluing it there.

133 There is, therefore, as much reason to consider Lipman's pencil to be the equivalent of Gray's (and Gray claimed equivalents), and to be thus anticipated by Gray, as there is to consider Hufeland's pencil the equivalent of Lipman's,—for complainant's experts state that the peculiar arrangement and structure of Lipman's pencil consist in enclosing the rubber in one end of a continuous holder, made of a material which can be cut away, and that a pencil in *two parts*, or having the rubber contained in a separate tube attached to the end of
134 the pencil, of like material, is an *equivalent* of Lipman and Reckendorfer, (Record, pp. 28, 30-31); and such a pencil would Gray's be, the holder being of like material—and it might be. Therefore the converse must be true, and Lipman's continuous holder is the equivalent of Gray's holder in two parts,—and Gray claimed, equivalents.

3. There were, also, well known and on public sale prior to Lipman's alleged invention, the following articles, viz.:

135 Wooden pencils, containing respectively india rubber and ink-erasing substance inserted in one end in the central groove, to be exposed by cutting away the surrounding wooden sheath, but not containing any lead in the opposite end.

(Defendant's Exhibits S, Z and Y, Record, pp. 267, 268, 270–271, 276.)

Also, similar pencils, having india rubber and ink-erasing substance, inserted in the opposite ends, in the central groove of the same wooden holder, each to be in
136 like manner exposed, as required for use, by cutting away the respective ends of the wooden sheath.

(Defendant's Exhibit T, Record, pp. 268, 270–271.)

And all these articles, Exhibits S, T and Z, are shown by defendant's expert to differ from the alleged invention shown in both the Lipman and Reckendorfer patents, *only* in the absence of the *lead* (p. 295).

4. It is, also, in evidence, and not controverted, that

Joseph H. Adams, at the time his deposition was taken, 137
Examiner of Interferences in the U. S. Patent Office, as early as 1849 or 1850, had, and continuously used in public, in his business in Washington, D. C., a pencil-eraser made by him, consisting of a lead-pencil with a piece of india-rubber enclosed in a metallic cylinder or tube, attached to one end, of which Defendant's Exhibit A, December 4, 1872, is a specimen (Record, pp. 273–274, 276.)

Similar pencil-erasers are, also, proved to have been made and used in public, in his business, by Alvin R. 138
Dunton, a teacher of penmanship and drawing, in Boston, Massachusetts, and elsewhere, as early as 1852, and subsequently.
(Defendant's Exhibits H and K, Record, pp. 210, 212.)

The only difference between these pencil-erasers, Exhibits A, December 4, 1872, H and K, and what is stated by complainant's experts to be the *equivalent* of and substantially the same as what is shown in the Lipman and Reckendorfer patents,—is that the former do not possess the capability of being easily cut away to expose 139
fresh surfaces of the rubber, as a property of the material used, while the latter do.

Lipman's claim to invention, therefore, by complainant's expert's own construction, depends upon whether the mere substitution of a material capable of being easily cut away, in place of that already used, without such capability,—and, assuming the correctness of their opinion of equvalents, nothing more is shown,—can be considered *invention;* especially in view of the fact that pencils with india rubber as well as ink-erasing substance 140
enclosed in the same material —wood—in the same manner and for the same purpose (Defendant's Exhibits S, T and Z), were already known and on public sale.

Such a claim may well be considered to come fairly within the case of *Hotchkiss* v. *Greenwood*, 11 How., 248, and other cases to the same effect,—for, surely, the exercise of the inventive faculty was not required to substitute *wood*,—which had already, in the same manner and

141 for the same purpose, been used for enclosing the rubber and attaching it so enclosed to a lead pencil, to which, also, it had already been attached, in the same manner and for the same purpose, with the only exception, that the *material* enclosing it was different.

5. It is, also, in evidence that a metallic crayon-holder, having a piece of india rubber grasped at one end, for erasing purposes, and a piece of marking material grasped at the other end, was old. (Defendant's Exhibit, D,
142 Record, pp. 192–193, 211–212.)

And Judge WOODRUFF thus summed up in relation to the state of the art prior to Lipman's alleged invention. (Record, p. 505):

"As a means of producing a mark, there is no pretence of its novelty. Pencils of the same material, containing the same marking substance inserted in the same groove, were common before either of these patentees
143 were born, and erasers, inserted in grooves, in wooden sheaths or holders, are proved to have been in public use and on sale before either of the alleged inventions. The proofs establish that, for all the purposes to which complainant's pencils are adapted, pencils, made by inserting a marking material in a groove in the center of a stick, which in use is to be cut away to expose more and more of the marking material as it wears away or becomes blunted in use, were common. And erasers in like form of pencils, having the erasing material inserted in a groove in the center of a stick, which in use is to be
144 cut away to expose more and more of the erasive material as it wears off or becomes soiled or blunted in use, were made and on public sale. Not only so, these latter were of a size of sheath sufficient in strength to allow the use of the desired size in the erasing material. There were thus in known public use two separate instruments, each consisting of a wooden sheath or holder to protect its enclosure, and to be cut away as the use of the enclosed substance might require, one of them containing

(grooved therein) a material for making marks (writing 145
or drawing), and the other containing (grooved therein) an erasive material for removing marks (writing or drawing). Each was a specific instrument to be used to produce entirely distinct and even opposite results.

"Not only so; experience had suggested the convenience of uniting these two instrumentalities in one implement; that is to say, the provision of a single or common holder for the marking material and the erasing material at opposite ends, so that each should be present or immediately in hand, when the other was used. This 146
was illustrated by the use of a metallic adjustable holder, at one end grasping the marking material, and at the other grasping the erasing material, each made moveable therein as it became worn, instead of cutting away the holder itself. More strikingly illustrated by implements made by attaching to the end of an ordinary wooden pencil a cap of india-rubber, held thereto by its own compression, or by some metallic ring, band or ferrule; also by inserting the end of a pencil in the end of a tube in which india-rubber was inserted at the other and outer 147
end, of any desired size."

II. Not only is novelty disproved by the state of the art, but substantially the *very* article described and shown in the Lipman patent had for some years previously been known and put into practical and continuous public use. And some of these original pencil-erasers are put in evidence by the defendant. (Defendant's Exhibits, E, G, 148
I, CC, DD, EE, FF, GG, (Sawyer.))

With reference to which Exhibits, and defendant's proofs of the prior knowledge and public use of such pencil erasers, Judge WOODRUFF, after referring to the state of the art, as above quoted, added, (Record, p. 506.):

"I am constrained, by what I deem the preponderance of the evidence, to find, also, that before either of the

149 alleged inventions of the above-named patentees, complete, practical and useful pencils were made and put into open, practical use, for several years, for writing, drawing and erasing, constructed by removing the lead from a portion of the groove in an ordinary lead pencil, and substituting therefor in such groove india-rubber as an eraser. Thus a form of combined pencil and eraser was produced, having one wooden sheath or holder, with lead and marking material at one end, and an eraser of
150 india-rubber at the other, the marking material and the erasing material being each strengthened and protected, and in use, as they wore off, more exposed by cutting away the wood of the pencil constituting their sheath. What then remains which could be the subject of a patent, there being no claim that the materials themselves, or the process of preparation, were in any sense the new?"

And in his further consideration of the case, he treated this direct priority as established.

151 In view of this deliberate and emphatic finding by Judge WOODRUFF, upon a question of fact, a detailed reference to the voluminous testimony of the many witnesses by which it is sustained is not considered necessary upon this appeal.

That it is sustained by the testimony produced will not, indeed, be denied, and it is considered sufficient to refer only to complainant's attempts to weaken its effect, by endeavoring to destroy, or at any rate, prejudice the
152 credibility of two of said witnesses, and to impeach the genuineness of defendant's Exhibit E, and, by the introduction of negative testimony, to cast doubt upon positive, affirmative testimony.

1. To impeach the general reputation for truth and veracity of James Summer, one of these witnesses (Record, p. 278, *et seq.*), three witnesses were produced, Phil-

armon Ruggles, (Record p. 80); J. Walter Bradlee (p. 153
86); and John Myers (p. 94.)

It was a failure, as will appear from reading their testimony. They all showed themselves to be Mr. Sumner's personal enemies, to have had difficulties with him, and to be actuated by ill-will toward him.

But, although unnecessary, at his instance, the falsity of their testimony in fact, and his good character and reputation were affirmatively proved, beyond question, by many of of the most respectable residents of his town 154
and vicinity.

Rev. John H. Morrison, Senior Pastor of the First Congregational Church of Milton (p. 359); Rev. Albert K. Teele, Pastor of the Orthodox Congregational Church in Milton (p. 361); Hon. James M. Robbins, Ex-State Senator (p. 360): Thomas H. Hinckley, the artist (p. 361); Stillman L. Tucker, who had held the office of Selectman, and many other town offices in Milton (p. 362); Simeon Emerson, Collector of Taxes in Milton since 1842 (p. 368); Benjamin C. Vose, Cashier of Bay State Iron Works (p. 368); Hon. George Penniman, Ex-State Sen- 155
ator and member of School-board in Milton (p. 369); George L. Burt (p. 364); Eldridge Blackman (p. 365); A. P. Blake (p. 370).

Mr. Sumner's testimony, in itself conclusive upon this question of priority, is thus left to stand with its full force and effect.

2. The attempt to discredit the genuineness of Exhibit 156
E will be next considered, because complainant evidently most relied upon and made it most prominent, and because, thereby, it was intended to break down the whole testimony of Alvin R. Dunton.

With regard to Exhibit E, Mr. Dunton had already testified (Record, p. 213), that he had then recently obtained Exhibit E from Mrs. Rachel B. Thomas, at Cam-

157 den, Maine, at whose house, where he had then resided, he left it, with other things, in the fall of 1856.

And Mrs. Rachel B. Thomas had already testified (p. 239), that it was in her possession, until Mr. Dunton then recently came to Camden, and asked if she had any of the pencil-erasers which he had formerly used there, then she found this one, and one of another kind, in her private box in a drawer in her bureau, and gave it to him, and that it had been there from the time Mr. Dunton had been there in 1855 or 1856; and further testified (p.
158 239), that she had seen it in that box sometime *before* Mr. Dunton came for it; and (p. 240) that she remembered putting it into the said box (p. 242), as near as she could recollect, in 1855, and (p. 241) that the drawer was locked.

The following is the foundation of this attack upon the genuineness of Exhibit E:

Complainant produced Edwin W. Gay (Record, p. 55),
159 and Samuel S. Gay (p. 74), of Aaron R. Gay & Co., stationers in Boston; who testified that, at some time during the winter preceding the taking of defendant's proofs (March, *et seq.*, 1873), the exact time they cannot fix, Mr. Dunton made inquiry at their store for lead pencils made by the same manufacturers as the lead pencils in Exhibit E appeared to be made by, pencils of whose manufacture had been out of the market for many years; that they happened to have a few, and he bought one.

And Charles H. Hooper, of Hooper, Lewis & Co., also stationers in Boston; who testified (p. 72) that Mr.
160 Dunton made similar inquiries at their store, and that, not having them, he recommended him to inquire at Aaron R. Gay & Co's., as a place where he would possibly find them.

And produced, also, Mrs. Sarah L. Barbour, a daughter of Mrs. Rachel B. Thomas; who testified that she was staying at her mother's when Mr. Dunton came and got Exhibit E; that he arrived on a Saturday, and *she did not know* of his saying anything about such a

pencil before the next Monday evening; and that, while 161
there, he slept in a room shown to adjoin Mrs. Thomas' bedroom, in which she kept Exhibit E (Record, p. 51).

Complainant's theory was, evidently, that Exhibit E was *fabricated* by Mr. Dunton, *after* he bought the pencil at Gay's store, and with *that* pencil,—that he took it to Camden, surreptitiously placed it in the box in Mrs. Thomas' bureau drawer, which she had testified was locked, and had opportunity to do so by occupying the next room.

But this theory, which was, moreover, rendered im- 162
possible by Mrs. Thomas' definite testimony that she remembered putting Exhibit E in her box in 1856, that she had, in fact, *seen* it there *before* Mr. Dunton came to Camden, was exploded by complainant's own witnesses, for—

Upon cross-examination (p.52), Mrs. Barbour admitted that she was not present all the time between Saturday morning and Monday evening when Mr. Dunton was in company with her mother; and, it farther appearing that 163
her testimony was not correct as to the room occupied by Mr. Dunton while there, it was corrected by stipulation to effect, that, in fact, he slept up stairs (pp. 423, 433–434), as Dunton himself testified (p. 434).

And Mr. Hooper farther testified (p. 72), that when Mr. Dunton made said inquiries at his store he stated that he wished to know if they had any pencils like one which he showed him, and which (p. 73) he took into his hands and examined, and thus describes (p. 73).

"It was a pencil made of plain cedar, looking as 164
though it had been in use for many years, with a small piece of rubber protruding from one end, and the lead from the other; I should say the pencil was about two-thirds the usual length; it had enough of the mark on it for me to know it was manufactured by Herrick & Blunt." And then, being shown Exhibit E, he testified (p. 73), "I should say that was the identical pencil, the same portion of the name of Herrick being gone as on the pencil he showed me."

165 Thus failing to lay the slightest foundation for so serious a charge, and *after* Mr. Hooper's deposition had been taken, Joseph Illfelder,—who was, together with Isaac Hirsch, complainant's agent and manager, on his behalf, of this case,—offered himself as a witness, and, under objection, testified to various statements he alleged to have been made to him, or to a lawyer employed by him in Boston, by Silas C. Thomas, who had
166 already been examined as a witness on the part of defendant,—to the effect, that Dunton bought an old pencil and rubber, and with them, he, Thomas, acting in collusion, made Exhibit E, and then took it to Camden, and surreptitiously introduced it into Mrs. Thomas' box, where she found it. And he produced a written statement, purporting to be signed by Silas C. Thomas, to such effect, and which, he testified, he received from said lawyer (Record, pp. 132-134, 144-145).

Silas C. Thomas was not produced as a witness to
167 substantiate this, nor any reason for not doing so shown.

Such alleged hearsay testimony, suspicious as it was on its face and by reason of the circumstances under which it was offered, would have been unworthy of notice, but for the intent to thereby prejudice defendant and all his testimony, and to even, perhaps, indirectly implicate counsel.

But, before showing how complely its falsity is proved, and the genuineness of Exhibit E established, it is pertinent to refer to the antecedents and connection of this JosephIllfelder with complainant and this case, and his dealings with Silas C. Thomas, all which are in evidence.

168 This Joseph Illfelder, as appears from his own cross-examination, was one of the applicants for said Hufeland patent, for which complainant was, himself, also, an applicant at first, but, after making oath that he was himself the first and original inventor, withdrew in favor of Illfelder, and became one of Illfelder's principal witnesses (Record, pp. 138–139).

But, by every tribunal in the Patent Office, Illfelder's 169
claim was held to be destitute of merit, if, indeed credible, the Commissioner, upon his appeal, saying with reference to the evidence by which it was supported, "To my mind, as it seems to have appeared to the mind of the Examiner and Board, the evidence seems entirely insufficient, and in some respects, incredible," (Defendant's Exhibit WW, Record, pp. 498, 499.)

And failing to secure said patent, this suit was commenced for the evident purpose of making it valueless to every one else. 170

After Silas C. Thomas had been examined as a witness on the part of defendant (Record, p. 204), this Illfelder, in connection with a private detective and a lawyer in Boston, is shown to have been engaged in negotiations with him which resulted in procuring said statement from Thomas, for which he was paid down $25, and in taking him into complainant's employment for the purposes of this case, at a fixed salary of $5 per day.

(Record, pp. 132–134, 136, 142, 347, 383, 386, 419, 472– 171
475, 477–479.)

By the same testimony and, p. 432, Thomas' character, motives and threats of revenge against Dunton are shown.

And Mr. Dunton himself testifies (p. 432) that, until that same winter, he had not seen Thomas since the winter of 1857, and that, upon then again meeting him, he represented himself as belonging to the Young Men's Christian Association in Boston, that they had procured him a situation, that he was strictly temperate, &c. 172

In connection with this trafficking by Illfelder with Thomas, a similar attempt with another of defendant's witnesses, Charles A. Evans, which, however, failed, is referred to (Testimony of Charles A. Evans, pp. 419-421; John M. Whittemore, p. 413; Cyrus G. Spaulding, p. 417.) And in connection with this, the bill of said private detective, M. J. Ahearne, made out to "Joseph Illfelder or Eagle Pencil Co." (pp. 178-179), is significant

173 and particularly the item of June 18 and 19, "Expenses to Salem and Revere," inasmuch as Mr. Evans was the only one of the witnesses on either side who resided at Revere.

The testimony of Alden Crockett (p. 377 *et seq.*) is also referred to.

It is submitted that this attempt to discredit the genuineness of Exhibit E, and by such very questionable
174 means, is, in no respect, to be justified or excused.

This attack, however, is affirmatively and conclusively met by defendant.

As shown, the *only* fact proved, and that, upon which this whole superstructure of conjecture and inference was built, was Dunton's inquiries for and purchase of a lead pencil of the same manufacture as that of Ex-
175 hibit E.

That *was* a fact, and a very simple and innocent fact.

On Mr. Dunton's return from Camden, February 20, 1873, bringing with him Exhibit E, he at once showed it to Peter Thacher, one of defendant's counsel in Boston, and then took it away, saying to Mr. Thacher, that he was going to see if he could find some pencils of the same make or manufacture, and he afterwards told Mr. Thacher he did find some. This Mr. Thacher testifies
176 to (Record pp. 378, 381).

Mr. Dunton himself testifies (pp. 427-428) that he did this in order to establish, as accurately as possible, the date at which he made Exhibit E, by ascertaining when such pencils were in the market.

He is confirmed, not only by Mr. Hooper, complainant's own witness, as already shown, but also by the following other stationers, of whom, at the same time, he made similar inquiries, and to whom he also showed Exhibit E, and who identify it: John M. Whit-

temore (Record pp. 412–413); Horace G. Tucker, of J. 177
L. Fairbanks & Co. (pp. 448–449); and Charles W. Hill, who was in the rubber business, and of whom Dunton inquired about the age of the rubber in Exhibit E (p. 424).

These inquiries were openly made, and were certainly natural and reasonable, and, in their course, he was finally referred to Aaron R. Gay & Co., where he did find and buy the pencil.

In making these inquiries, he was accompanied by 178
Lorenzo J. Mathews, who testifies to the same effect (p. 385).

The purpose for which he went to Camden is shown (p. 379) by Peter Thacher, defendant's counsel in Boston, and by Joseph P. Waterhouse (p. 68), who was complainant's own witness.

And, finally, the history of Exhibit E from the time Mrs. Thomas found and gave it to him, on the very day he reached Camden (Saturday), is traced, and its exhi- 179
bition by him to many persons, who identify it, is proved, not only by his own testimony (pp. 427–428), and by that of the witnesses already mentioned, but also by the following:

George W. Dunton (pp. 342-343); Elizabeth B. Dunton (pp. 339-340); Lyman P. Harwood (p. 331 *et seq.*); Julia A. Harwood (p. 327 *et seq.*); George W. White, register of deeds for Knox County, Maine, since 1860 (pp. 307–308); Lorenzo J. Mathews (pp. 384–385); Seldom D. Wiley (pp. 347–348). 180

Moreover, the very pencils which Mr. Dunton did purchase at Gay's, and all the specimen pencil-erasers made at request of defendant's counsel, are produced and put in evidence.

(Defendant's Exhibits, KK, NN, OO, PP, QQ, Record, pp. 59, 378, 379, 380, 381, 405–406).

181 3. Failing to discredit the *genuineness* of Exhibit E, complainant attempted to disprove its *utility* as an eraser by expert witnesses, Lyman B. Hanaford (pp. 99, 101, 104); Rudolph Stueler (p. 105); George W. Wundram (p. 106); Teilè H. Müller (p. 108).

This requires little comment, because it is a matter to be readily determined by the Court, without the aid of experts, and, even if so, the Lipman pencil would be open to the same objection. But these witnesses themselves admit sufficient utility.
182

4. Complainant, at first, endeavored to discredit Mr. Dunton's testimony by special contradictions.

(*a*) That instead of 1856, as testified to by Mr. Dunton, he and Thomas were, in fact, teaching at Lincolnville, Maine, in 1857.

This was an evident error on the part of Mr. Dunton,
183 which, by complainant's own witnesses, it is shown he hastened to correct as soon as he ascertained it. And it was an error for which not he, but Silas C. Thomas, was responsible.

(Testimony of A. R. Dunton, (p. 433); Seldom D. Wiley (pp. 346–347); Charles A. Evans (pp. 418–419.))

(*b*) That, in fact Dunton and his wife were not in Camden and Lincolnville, in the fall of 1855, and were not at Mrs. Thomas' at Thanksgiving that year, as testi-
184 fied to by Mr. Dunton,—thus endeavoring to indirectly disprove his possession and use of such pencil erasers there at that time.

The testimony produced for this purpose was negative and very inconclusive.

Mrs. Sarah L. Barbour testified (Record, p. 51) that *she* spent Thanksgiving there in 1855, and being asked who was there, answered, "I don't think we had any Thanksgiving, any more than our family."

And William H. Hodges testified (p. 49) that *he* did 185
not, *to his knowledge*, see Dunton and his wife in Lincolnville and vicinity in 1855.

And this was all.

On the other hand, Mr. Dunton's testimony in this respect was fully confirmed by the following witnesses: Albion Drake (p. 309 *et seq.*); George W. Dunton (p. 343); Ermina G. Dunton (pp. 344–345); Miles Fuller (p. 310 *et seq.*); William R. Mathews (p. 304); Francis M. Tower, (pp. 334–335); Martin V. Tower, (p. 298); Martin 186
W. Tower (p. 314); Warner C. Tower (p. 312); Alden Crockett (p. 376.)

Mrs. Thomas, herself, had already testified directly that Dunton and his wife *were* at her house at Thanksgiving, 1855, and that he had and used a pencil eraser, like defendant's Exhibit E, there at that time (Record, pp. 238–239); and being asked, "How do you fix said time of his being there?" answered, "Well, he was married that year; he had been married two or three months. If you want anything more special, my daughter was married that 187
seme year, and they all met there Thanksgiving day; that is why I recollect it so plainly."

And William H. Hodges, himself, admitted that he was, at the time, teaching three miles away, and says, "I should not have been likely to have seen them without it had been Saturday or Sunday that they were there" (Record, p. 309).

5. Complainant, also, endeavored to contradict Mr. 188
Dunton's testimony, as well as that of the many witnesses who testify positively and affirmatively to his having and using in public such pencil erasers, by several witnesses, who testify to having been for greater or less specified times at Mr. Dunton's rooms, or associated with him, and that they did not see, or have no recollection of them.

Such merely negative testimony, limited as it is to specific periods of time or occasions, is clearly insufficient

189 to rebut affirmative and positive testimony, and it is not considered necessary to refer to it in detail.

Moreover, it appears that these witnesses were and had long been Mr. Dunton's personal and business enemies and rivals, between whom and him a public and very acrimonious controversy, with reference to copyrights, &c., had long been pending.

Such testimony is always to be distrusted, and, in the present case, the more so, that these witnesses are themselves contradicted upon particular matters as to which
190 they testified.

6. A similar attempt was made to contradict, by like negative testimony, the affimative and positive testimony of defendant's witness, James A. Page, head-master of the Dwight School in Boston (Record, p. 197), as to *his* possession and prior knowledge, in 1856, of such a pencil eraser, independently of Dunton.

George B. Hyde, a teacher in the same school, was
191 produced and testified that *he* did not *remember* seeing a pencil like Exhibit E on Mr. Page's desk. But on cross-examination he admits (Answer to X. Q. 12, p. 78) that he does not remember any particular time that he examined Mr. Page's pencils, and was accustomed to visit Mr. Page's rooms more frequently while Mr. Page was an assistant teacher than after he became head-master (during which latter period Mr. Page testifies to having such pencil eraser).

192 This witness was undoubtedly an honest one, but his testimony is precisely of that negative and uncertain character, so likely to be influenced by impressions, or the want of impressions, to which it is so dangerous to give any weight, as against the positive, affirmative testimony of a witness of equally high character and position, as is Mr. Page.

7. Failing to shake the testimony of Mr. Dunton, as a

last and desperate resort, an attempt to discredit his 193
personal character was made, and in a manner which, under the circumstances, is more open to reprehension than the attempt to discredit the genuineness of Exhibit E,—for, in that case, complainant may be supposed to have been, at first, aware only of Mr. Dunton's purchase of a pencil of the same manufacture at Gays',—while, in thus attacking his personal character, complainant must have known of and suppressed the complete and justifying explanation, and to have deliberately meant to present to the Court as a crime what he knew to have been only 194
a misfortune.

A certificate of Mr. Dunton's conviction, *twelve years before*, in a Justice's Court, of petty larceny, was offered in evidence (Complainant's Exhibit X, Record, pp. 143–144).

Even had this not been fully explained, it could not have availed to disqualify Mr. Dunton as a witness, under the laws of the State of New York.

Carpenter v. *Nixon*, 5 Hill, 260. 195
Shay v. *The People*, &c., 22 N. Y., 317.

But it *is* fully explained; which explanation, although as public as his conviction, and the knowledge of it as accessible, and, in fact, to be derived from the same source, complainant entirely omitted to present.

It is true, that twelve years before, Mr. Dunton had been convicted as certified, but it is equally true that he was, at the time, insane,—the result of long continued sickness and physical and mental prostration. Where- 196
fore his sentence was never carried into effect, but he was, at once, voluntarily discharged, and remained thereafter, for a considerable time, under medical treatment.

He was, at the time and since, completely exonerated by the prosecutor himself, whose deposition is produced, and by all who had knowledge of the matter, and upon *certiorari* duly allowed, granted and filed, im-

197 mediately after his conviction,—although not brought to hearing and determination until then, recently,—his said conviction, and all records and entries thereof, or concerning the same, were adjudged to have been and to be erroneous and illegal, and were reversed, vacated, overruled and set aside, and adjudged to be of no force, validity or effect whatsoever.

All this is in evidence.

Defendant's Exhibits MM (Record, pp. 495–497); XX (p. 467); testimony of Dr. Charles Sumner (p. 459);
198 William L. King (p. 462); A. Sidney Pratt (p. 466); Wallace Darrow (p. 468).

No attempt was specially made on the part of defendant to affirmatively establish Mr. Dunton's good character, but his ability and prominent position in his profession, and his good reputation, do appear incidentally, and may properly be contrasted with this charge.

He was well known as an author of writing books, and
199 of a system of penmanship known as the "Duntonian," and as, among the best, if not, himself, the very best penman and teacher of penmanship in the United States (Record, pp. 198, 281, 252, 259), and, as such, had for a great many years been connected with the principal schools and institutes throughout the country.

Long before this litigation, he was spoken of by the Rev. A. A. Miner, pastor of the School street church, in Boston, as "a gentleman well known and highly respected in Boston" (Defendant's Exhibit LL, Record,
200 p. 495).

And William R. Mathews, who was also one of complainant's witnesses, who all his life had known Mr. Dunton, testifies (p. 303) that Mr. Dunton's character was good as far as he knew or ever heard.

In fact, this charge against him was made by complainant only at second-hand, for it had, long before, been made by his business rivals and personal enemies, from whom complainant derived it, and who are complainant's witnesses, with intent to shake the confidence

of the Boston school authorities in him, and it had been then shown to be unfounded and malicious, as appears from the certificates of Judge Husbands, a well-known lawyer and register in bankruptcy, in Rochester, New York, and Dr. Charles Sumner (Record, pp. 236–237), and W. L. King, the prosecutor himself (Defendant's Exhibit XX, p. 467). 201

Judge Husbands certified, "I have never attributed any moral blame to him in that matter, for reasons quite satisfactory to myself on a close personal investigation. I think only envy, hatred or malice could torture this into any reason now to lead his friends in any manner to distrust him, and I believe he can be fully relied on. He is too much of a man to let this depress his prospects." * * "I cheerfully commend him as worthy of entire confidence, for his skill, integrity and ability, and usefulness in his profession." 202

Dr. Sumner, in certifying to his temporary insanity, added, "Mr. Dunton has always been highly esteemed in this community."

And Mr. King stated, "I have fully satisfied myself that he was not in the least to blame in the matter." * * "I have no doubt Mr. Dunton was honest in the transaction, and believe him every way worthy of public patronage." 203

And all this was years before this suit was commenced.

It is submitted, therefore, that so far from operating to Mr. Dunton's prejudice, or that of his testimony in this case, this attempt to defame him, and suppression of the facts, deserve severe condemnation. 204

Finally, it is not to be forgotten, that the prior knowledge and public use of such a pencil-eraser as Exhibit E is conclusively proved by other witnesses produced, whose credibility is not, and cannot be, attacked by complainant.

Of these, the following are particularly referred to: Benjamin F. Lord (p. 244), who was examined at his

205 house, to which he was then confined by the illness of which he soon after died; Charles French (p. 249), proprietor of "Union Business College," in Boston, and a graduate of Harvard University; Charles A. Evans (p. 200); and George A. Sawyer (p. 257).

And to these may be added James Sumner (p. 278).

III. Not only is the alleged invention shown in
206 both complainant's patents invalid, both by the state of the art, and by prior knowledge and public use of substantially the same article, but even the special features claimed in the Reckendorfer patent, were not novel.

(*a.*) Reckendorfer's patent is dated November 4, 1862, September 7, 1870—two years before this suit was commenced, and nearly as long before Lipman made any assignment of his said patent—he made an assignment to
207 one Tower, in which, after stating, that,

"Among the original experiments and samples made prior to adoption of style, was one like that at the head of this sheet, having a conical top to allow for the enlarged rubber at end, made before any of my pencils were offered in the market, and of which one is still in my possession, marked A, which was made at same time as, or previous to, my application for said letters patent."

He transferred to said Tower, his heirs and assigns, all his right, title and interest "in above conical-top
208 pencil," and, in consideration thereof, said Tower agreed to pay said Lipman, his heirs or assigns, "one-half of net proceeds of said invention." (Defendant's Exhibit, HH, Record, p. 495.)

Being called as a witness by defendant, Lipman was compelled to produce said original "conical-top pencil." (Defendant's Exhibit GG, Lipman, p. 286.)

He testified, although very reluctantly, that said exhibit was made according to his device by his manufac-

turer, to whom he had given directions to make a pencil 209
to accommodate a thicker rubber than they had been using, and had been in his possession ever since; that he made said assignment of it to Tower, writing it himself, without dictation or advice from any one; that other specimens were made at the time like Exhibit GG, "so far as having lead in one end, and rubber in a similar conical or bulging sheath at the other end;" that he showed it to others, one of them John P. Charlton, and tried it by writing with the lead on paper, and erasing with the rubber. (Record, pp. 286, 287, 289–290.) 210

But, as to when he made this, all that, upon his direct examination, he can be got to say, is, "I can't say exactly when I first saw this; it must have been previous to August, 1862." (A. to 4 Q., p. 286.)

This witness was an unwilling one. He was complainant's assignor, and the patentee of the Lipman patent. He admitted, also, that he was a customer of complainant, and sold his goods, and, furthermore, that he had, for some time, been in communication with com- 211
plainant's agent, Isaac Hirsch—who, with Joseph Illfelder, were the managers of this case, on complainant's behalf—with reference to this very conical-top pencil and his assignment of it to Tower, "thinking it might have a bearing on the points in dispute" in this case (p. 289, A. to 46 Q).

And upon cross-examination, he testifies (p. 288) that he *abandoned* said conical-top pencil—"that style"—and that his statement, in said assignment to Tower, that it was among his "original experiments," and made "at the 212
same time as, or previous to, my application for said letters patent," was a "great error," which, he says, he discovered "only last night."

No reason for his not discovering it before, or for his discovering it then, is attempted to be given; and it is certainly singular, that notwithstanding his then recent communications with Hirsch on this very subject, in anticipation of his being called as a witness, he should not

213 have made so important a discovery until the very night before his examination.

It is still more surprising that he should have made this "great error" in respect to the date of an invention which he claimed to have made, and in the assignment of which he was careful to provide for his own share of the future profits to be derived from it, especially, when he himself wrote the assignment without dictation or suggestion.

Under the circumstances, his alleged discovery of
214 this "great error," may reasonably be open to some suspicion, and the more so, that he evaded committing himself to any certain date.

He was, however, compelled to fix the time as, at any rate, as early as from December, 1861, to February, 1862.

And said John P. Charlton, his clerk, and one of complainant's witnesses in this case, being examined by de-
215 fendant at the same time, and who testified to Lipman showing him said conical-top pencil, was an equally unwilling witness, and equally indefinite as to the time.

Nevertheless, a prior perfected invention by Lipman *is* shown, which was a substantial anticipation of Reckendorfer, as construed by complainant's own experts, and is fairly within the decision of *Coffin* v. *Ogden et al.*, 3 Fish., 640, and its affirmance by this COURT, 5 Off. Gaz., 270,—for in that case Judge BLATCHFORD held that the
216 making by Erbe, prior to the invention of the patentee, of a single lock, which was a complete working, reversible latch, requiring no alteration, addition or improvement to fit it for use, and his exhibition of it to several persons—although he did not put it upon a door or into use—were sufficient to deprive the patentee of the right to be considered the original and first inventor; and that an invention may be considered a completed invention, put into practical form, and reduced to practice, *without* being put into *use* in the general

acceptation of that word ; and that *use* is not necessarily 217
required in order to show perfection or completion ; that such an *exhibition* of such lock must be regarded as substantially a *use*, adding, " These views are confirmed by, and result from, the most carefully considered cases and authorities which are to be met with on this subject (*Reed* v. *Cutter*, 1 Story, 590 ; *Bedford* v. *Hunt*, 1 Mason, 302 ; *Curtis on Patents*, Sec. 87 ; *Whiteley* v. *Swayne*, 7 Wall., 685)."

And in affirming the decision in that case, this COURT said, " The prior knowledge and use by a single person 218
is sufficient. The number is immaterial," citing *Bedford* v. *Hunt*, *supra*.

However, in the present case, a complete, practical, working pencil eraser, " requiring no alteration, addition or improvement to fit it for use," was made, and not only exhibited to several persons, but a practical and sufficient trial of it made by Lipman himself, for he testifies (Record, p. 287) " I tried it "—" By writing with the lead on paper and erasing with the rubber." 219

And this is not weakened by Lipman's present statement, in response to a leading cross-examination, that he abandoned it as a " style."

For, in *Household* v. *Neilson*, 1 Webs. Pat. Cas. 673, 718, it was held, " if there was a prior perfect invention, the abandonment of its use or exercise before the date of the patent, is wholly immaterial."

And in *Gaylor* v. *Wilder*, 10 How., 496, this COURT said, which is quoted with substantial approval in the recent 220
affirmance of *Coffin* v. *Ogden et al.*, *supra*.

" We do not understand the Circuit Court to have said that the omission of Conner to try his safe by the proper tests, would deprive it of its priority, nor his omission to bring it into public use. He might have omitted both, and also abandoned its use, and been ignorant of the extent of its value ; yet if it was the same with Fitzgerald's the latter would not upon such grounds be entitled to a

221 patent, provided Conner's safe, and its mode of construction, were still in the memory of Conner before they were recalled by Fizgerald's patent."

But, in fact, there is nothing to show that Lipman *did* abandon it. On the contrary, his conduct is of far greater weight than any present statement counsel can draw from a willing witness in the interests of complainant.

Years afterward, and years before this suit was commenced, and before Lipman had assigned his *patent* at
222 all, he is found assigning to Tower this conical top pencil eraser, as a subsisting claim of invention, alleged to have been made as early as, or earlier than that covered by his patent, and in so assigning it, carefully providing for his own interest in its future profits; and he has always preserved, and now produces, an original and perfect conical top pencil eraser, in the words of Judge BLATCHFORD, in *Coffin* v. *Ogden et al.*, *supra*, "requiring no alteration, adaptation or improvement to fit it for use."

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Realizing the necessity of carrying back the date of his own invention, said Hirsch and Bernard Illfelder, the brother of said Joseph Illfelder, and the son of complainant's partner, were produced as witnesses for that purpose on the part of complainant.

They testified to a casual conversation at a time which they can fix no more definitely than that it was near Christmas time, 1861, between Reckendorfer and themselves and another, who has since died, as to which of
224 two samples of pencils—one like complainant's Exhibit No. 10—which had been made by, and just received from Reckendorfer's partners in Europe, would be likely to sell best, (Record, pp. 114, 123.)

It is not shown that Reckendorfer invented, or claimed at that time to have invented, that pencil, nor is there any evidence that it was used or tried. In fact, it is admitted that not until a year afterward was any such pencil received for sale or sold in this country.

All that is shown amounts, even if true, to no more 225
than a casual conversation as to the comparative saleability of certain experimental samples of different articles which were made by other parties in, and then just received from, Europe, and which, if they ever existed at all, have disappeared.

1. Reckendorfer's patent is *prima facie* evidence of invention at its date. Prior invention being proved, the burden is on him, if he desires to carry his invention 226
back to a still earlier date.

This rule is thus stated by Judge CLIFFORD in *Jones et al.* v. *Sewall, Admr.*, 3 Off. Gaz., 630.

"Repeated decisions have established the rule that a patent duly issued, when introdued in evidence by the complainant in a suit for infringement, is *prima facie* evidence that the patentee is the original and first inventor of what is therein described as his invention, and, when taken in connection with his original application, is *prima facie* evidence that the invention was made at the 227
time the application is filed;— but when the patentee proposes to show that his invention is of a date prior to the time when he filed his original application, he takes upon himself the burden of proof, and to maintain that theory, as against another patented improvement of the same construction and mode of operation, he must prove not only that he made the invention at the period claimed, but that he reduced the same to practice in an operative machine."

And *Johnson* v. *Root*, 2 Cliff., 116. 228

And, to establish such earlier date, complainant must prove beyond a reasonable doubt that his invention was then complete and operative, not resting in speculation or experiment, nor simply in a state of progress, however near completion.

Opinion of this COURT, affirming *Coffin* v. *Ogden et al.*, *supra*.

229 2. Invention of an article made in a foreign country can date only from the time it is proved to have been introduced into and reduced to practice in this country.

Kingsley et al., Com. Dec., 1853.
Hovey v. *Illfelder et al.*, Id., 1872, 2 Off. Gaz., 493.
Smith v. *Barter*, Id., 1874; 7 Id., 1.
Tucker v. *Davis*, Id., 1872; 2 Id., 224.
Bartholomew v. *Sawyer*, 4 Blatch., 347.

It reasonably follows that merely sending an experi-
230 mental sample to this country to obtain a report as to the advisability of making it, as a question of saleability—which sample is sent back or disappears, and is not followed by the introduction into this country of the article for a year or more—cannot be considered an anticipation of an intermediate, independent invention.

3. As a matter of fact, moreover, it is not proved—the burden being on complainant to do so—that the conversation referred to did occur prior to the time
231 Lipman made his said conical top pencil eraser.

(*b.*) The tapering form of the pencil is, also, shown to have been old, and already used in a similar combination. (Defendant's Exhibits U and AA, Record, pp. 268–269, 271).

Therefore, in both the enlargement of the rubber end,
232 and the tapering form, Reckendorfer's patent is invalid for want of novelty. And Judge WOODRUFF, without even noticing complainant's attempts to thus carry back the date of his alleged invention, said (Record, pp. 507-508):

"It would be absurd to say that making one end of a lead pencil larger than the other, would be patentable. But, if it were patentable, the proofs show that pencils so made were not new, but were made and in use, and on public sale, before the patent to Rockendorfer, and that such

pencils were so made for the purpose of using the larger end to receive a cylindrical tube as a penholder, while the other was left conveniently smaller, containing the pencil lead. 233

"Again, Lipman also made pencils with an enlarged end to receive and hold the eraser. A pencil with a uniform taper, providing for an enlarged end to become the recipient of some other device, was not new, and a pencil with an enlarged end to receive and hold an eraser was not new. There is little left, if anything, to be called invention, to be covered by Reckendorfer's patent." 234

IV. Finally, it is submitted, that even an enlargement of the rubber groove, as compared with the lead groove in such a pencil eraser—which counsel below argued, is an essential feature of the Lipman invention, and to which only, Judge WOODRUFF, without, however, conceding patentability, held the patent must be limited, if it can be sustained at all, which he certainly, to say the least, strongly doubted—was not new. 235

Mr. Dunton (Answer to Int. 32, Record, p. 215), testifies, that, in some cases, in making his said pencil-erasers like Exhibit E, "I 've cut a groove where I wanted one larger than the lead; put a piece of rubber in: stuck the piece on."

And, certainly, this was an obvious way to provide for the insertion of a piece of rubber in such a pencil-eraser, when one larger in section than the lead groove was required, and cannot be considered *invention*. 236

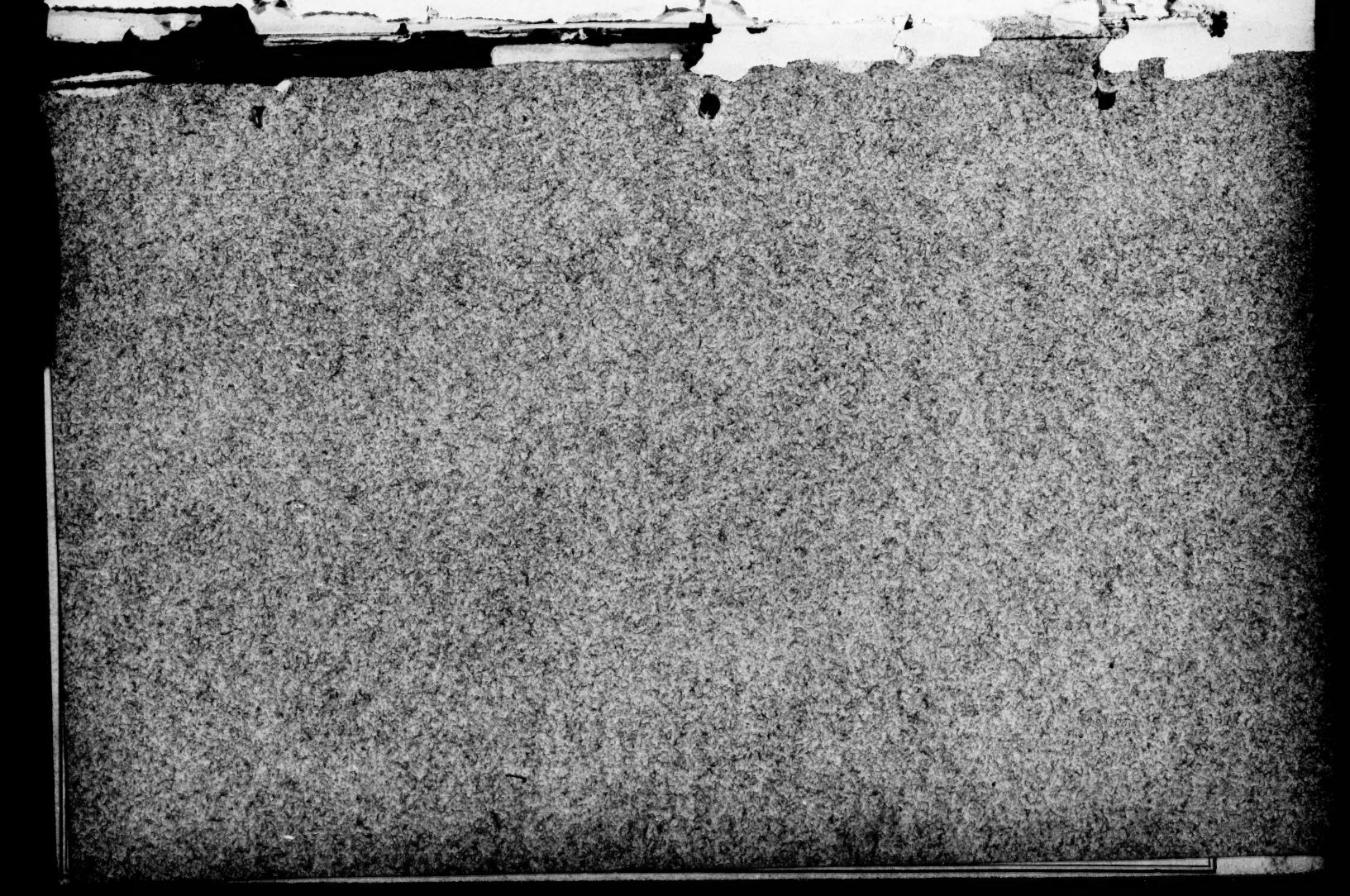
And Mr. Page, Head Master of the Dwight School, says of the similar pencil-eraser he testifies to having in his school, for several months at least, in 1856, that the section of rubber, as it appeared at the end, was a little larger than the size of the lead (Record, p. 197).

But, in fact, as already shown, this comparative en-

237 largement *cannot* be considered a feature of the Lipman patent, nor is it described or claimed in his patent as such, but the contrary, and if it were, it is not patentable.

In conclusion, it is respectfully submitted, that the complainant has wholly failed to establish the infringement charged in the bill; and that the patents of the complainant, charged to have been infringed, are them-
238 selves invalid, both as a question of patentability, and as a question of novelty and priority of invention; and that the decree of the Circuit Court, appealed from, ought to be affirmed.

JOHN S. WASHBURN,
Respondent's Counsel.



IN EQUITY.

Supreme Court of the United States.

No. 215.

JOSEPH RECKENDORFER,

Appellant.

vs.

EBERHARD FABER,

Respondent.

Respondent's Brief.

In reply to Appellant's Brief.

JOHN S. WASHBURN,

Counsel.

New York:
DE LACY & WILLSON, LAW PRINTERS,
Nos. 99 and 101 William Street.

1876.

Supreme Court of the United States. 1

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOSEPH RECKENDORFER, *Appellant*	2
vs.	*In Equity.*
EBERHARD FABER, *Respondent.*	

RESPONDENT'S BRIEF IN REPLY TO BRIEF FOR APPELLANT. 3

I. If, in the first error assigned by appellant (p. 5), it is intended to be understood, that Judge WOODRUFF based his substantial finding of want of patentability upon the construction that the subject matter of said patents was really in the class of machines, and not in that of manufactures, it is a misapprehension.

He did indeed say, that "to call the subjects of these patents articles of manufacture, in likeness to ready-made clothing, or food, or medicine, would not truly represent their character or functions." And it may, perhaps, be reasonably inferred, that he denied to them the assumed character of new "articles of manufacture," except in a commercial sense, and was inclined to construe the meaning of "manufactures," as one of the four classes of invention, to the *product* of some process 4

5 or mechanical operation, and to consider the application of the term "articles of manufacture," as employed by complainant, as unauthorized. But he certainly applied and intended to apply the same test of patentability to it, in the same manner and with the same result, whether to be included in the one or in the other class.

II. In his second assignment of error, appellant charges that Judge WOODRUFF limited the patents to im-
6 plements "in which the holder was made of wood exclusively, and by a process of construction strictly the same as that by which an ordinary pencil is made."

This, too, is a misapprehension, except, indeed, so far as that such must be the necessary inferences from the language itself of the specifications and claims, which Judge WOODRUFF repeats.

Nor did Judge WOODRUFF hold that the patents, if patentable in themselves, "did not embrace implements having the characteristic features of the patented imple-
7 ments, but having the holder partly of wood and partly of paper, as shown in the infringing Exhibits."

On the contrary, while expressing his unwillingness "to relax at all the just protection due to inventors against a merely evasive substitution of equivalents," he found expressly that the alleged infringing Exhibits did *not* have the characteristic features of the patented implements, being of a different construction, and that "it is not material that in one respect the same *result* is produced, viz., that in each the sheath of the eraser can be
8 cut away." (Fols. 913—914.)

III. In his third assignment of error, appellant charges error in finding that pencils and erasers were "made by attaching to the end of an ordinary wooden pencil a cap of india-rubber, held thereto by its own compression, or by some metallic ring, band or ferrule."

This is an alternative statement, and was pertinent with reference to Joshua Gray's application (defendant's

Exhibit R, p. 491), which showed a convex piece of rubber upon the end of a lead-pencil and a surrounding holder; and it might be considered that such convex piece of rubber was so attached by its own compression; and, as matter of fact, in the recent case of *The Rubber Tip Pencil Co. vs. Howard, et al.*, 20 Wall., 498, referred to in respondent's brief, it was so claimed before this Court, and that it was an anticipation of the Blair patent, which was for a piece of rubber attached to the end of a lead-pencil by its own compression. 9

And one of complainant's own witnesses, George B. Hyde, testifies (fols. 140, 141, pp. 77, 78,) that in Mr. Page's and his school (the Dwight school in Boston,) as early as 1856, there were in use pencils with a "round rubber fastened to one end, raised up something like a small ball." 10

Moreover, Lipman himself disclaims "the use of a lead-pencil with a piece of India-rubber, or other erasing material, attached at one end, for the purpose of erasing marks." (Fol. 76, p. 40.)

And the prior knowledge and use of pencils having the India-rubber attached at one end by means of a metallic ferrule, is fully proved, as shown in respondent's brief. 11

It is submitted, therefore, that Judge WOODRUFF'S statement was sufficiently accurate, and that there was no error in the respect charged.

a. In support of the error charged, it is attempted to exclude, as incompetent testimony, the specifications and drawings in the matter of the application of Joshua Gray, on the ground that it was a rejected application. 12

1. They were put in evidence without objection. Had such objection been then taken, it could have been remedied by supplying any necessary proof of practical embodiment. The matter was discussed at the hearing be-

13 low solely upon the merits of what is therein shown and described. This objection has never been raised until now, and it is submitted, it is now too late.

2. As matter of fact, the application had been renewed and a patent granted to Gray, in accordance with it, prior to its being put in evidence.

3. Lipman was originally rejected upon reference to this application of Joshua Gray, as appears by defendant's Exhibit A, (fol. 875, p. 487). He amended his claim accordingly, including his disclaimer. The state of
14 the art shown in the reference, having been thus admitted by Lipman, needs no further proof.

IV. As farther error, it is charged in the third assignment, that Judge WOODRUFF erred in finding that before the inventions described in said patents, "complete, practical and useful pencils were made and put into open, practical use for several years, for writing,
15 drawing and erasing, constructed by removing the lead from a portion of the groove of an ordinary lead pencil, and substituting therefor, in such groove, india-rubber as an eraser," (fols. 910-911, pp. 505-506.)

And a considerable part of appellant's brief is devoted to an attempt to discredit the testimony by which this emphatic finding is sustained, an attempt which entirely failed before Judge WOODRUFF, although urged as recklessly and based upon the same unfounded charges and assumptions, as upon this appeal.

16

In addition to what is already contained in respondent's brief, upon this point, it is considered necessary only to refer to some of the material omissions and misstatements of testimony contained in appellant's brief.

1. It is said (p. 21) that when Alvin R. Dunton first came to defendant's counsel in Boston, he had none of

these pencils in his possession. It is inferred, therefore, 17
that those subsequently produced were fabricated.

All allusion is omitted to what was in evidence, that his premises were burned out in the great fire of November, 1872, which was the reason he could not produce any of his original pencil-erasers, like Exhibit E, he had long in use until then (fol. 377, p. 213); and that he subsequently *did* produce some of them, which had been accidentally saved from the fire by others, without his 18
knowledge, and of the existence of which he had been, when he first testified, unaware, and, of which, defendant's Exhibits CC, DD, EE, FF are some, and put in evidence. (fols. 387-390, pp. 218-220.)

2. It is said (p. 22), that when Dunton came to Camden to find such a pencil-eraser, and asked Mrs. Thomas to see if she had one, that he told her she need not look then; the inference being that he was not then prepared to have her look. The reason given for 19
so telling her, viz.: because he found her hard at work Saturday afternoon, and therefore, went away, is wholly omitted.

The inference, however, intended by the omission, may well be open to the criticism, that if Dunton *had* had such a fraudulent purpose, he would hardly have called her attention to the matter *until* he was in readiness to have her look, for she might, as she, in fact did, 20
look for it at once, and, if appellant's theory were correct, would not have found it.

3. The incorrectness of the statement in appellant's brief (p. 22), that Dunton stated before he went to Camden, that, if he went there personally, he could find one of the pencils, is not sustained by the testimony referred to,—that of Peter Thacher Esq., one of de-

21 fendant's counsel in Boston;—the zeal of counsel to find a pre-conceived design to deceive Mrs. Thomas, and to find the pencil at her house, and nowhere else, must have prevented an accurate statement of Mr. Thacher's testimony.

What Mr. Thacher did say, was, that Dunton said that Camden used to be his head-quarters, while teaching, that in 1855 he left drawing and writing materials, pencils, pens, &c. there, and thought if he should go there,
22 he should be able to find one or more pencil-erasers, which he made and used as early as 1855. He adds "He spoke of being able to find them at Hope, Belfast, or Appleton, if he couldn't find them at Camden, they being places where he used to teach in those years," (fol. 678, p. 379.).

His journey was not, therefore, limited to Camden, or to any particular person in Camden, but was one of investigation, and necessary investigation.

The query of counsel (p. 47), "Why did Dunton *him-*
23 *self* go to Camden? Why not write to Mrs. Thomas?" is therefore pointless.

4. It is charged in appellant's brief (p. 22), without qualification, that Dunton knew Silas C. Thomas to be a man of bad character. But the references show, that Dunton, until the winter when the testimony in this case was taken, had not seen Thomas since the winter of 1857, that then he was *intemperate*, but that, upon
24 so meeting Dunton again, Thomas represented that he had reformed, belonged to the Young Men's Christian Association, who had procured a valuable business situation for him in Boston, and that he was strictly temperate (fol. 773, p. 432).

It also appears from the same references that Dunton became aware of Thomas' real character *after* his testimony in this case had been taken.

5. It is charged (p. 27) to appear that Dunton made 25
in all *three* visits to Gay's store, and that at least one of these was *before* he went to Camden. As it is admitted (p. 41) that his "*second* call is plainly identified as having occurred the day of his return from Camden," bringing back with him Exhibit E, the original charge, that Exhibit E was, in fact, fabricated from the pencil *then* purchased at Gay's, is revoked; it is now charged that he must have bought *another* pencil at his assumed prior call, with *which* Exhibit E was made.

26

This theory has no support in the proofs. It is a reckless imagination and assumption in support of an equally imaginative theory.

It is contradicted by Edwin W. Gay himself (fol. 106, p. 57).

"X-Q. 26. Did you ever see the man whom you supposed to be said A. R. Dunton on any other occasion, except when you sold him the pencils?

A. I have. 27

X-Q. 27. When and where, and how many times?

A. Twice, at least; once in my store, and once on the street; in the store *since* the transaction referred to above, and on the street within two weeks.

X-Q. 28. On what street and where, within two weeks?

A. I don't recollect what street; he was talking with another man; it was in Boston; I did not speak to him; I passed directly by."

Samuel S. Gay, the other witness upon whose testi- 28
mony appellant relies, testifies (A. to Q. 4, fol. 134, p. 74). "*Probably* he was in three times."

And also testifies (fol. 137, pp. 75–76).

"X.-Q. 25. Did said Dunton ever purchase said Herrick pencil on any other occasion than this on which you think he did purchase one?

A. Not to my knowledge."

29 It is apparent, therefore, that it is not proved that Dunton did, as matter of fact, call at Gay's store *before* the time he purchased the pencil there, the day he returned from Camden, and it is proved by complainant's own witnesses, that the *only* time he *did* purchase such a pencil there was on *that* occasion.

The very foundation, therefore, for appellant's new theory is wanting.

6. It is charged (p. 44, *et seq*,) as another link in the
30 carefully wrought chain of assumed deception, that, instead of on Saturday, as testified to by Dunton, Mrs. Thomas did not, in fact, find Exhibit E until Monday evening, and he did not speak to her about it at all until Monday. Therefore, it is charged, that he had time to and did secrete it where she found it.

To meet the inconsistent proofs that, as matter of fact, Dunton *did* show Exhibit E. on *Sunday* to many credible and uncontradicted witnesses, and did inform them
31 that Mrs. Thomas *had* found it, it is said, (p. 45), that,—having it in his pocket, and intending to subsequently surreptitiously introduce it into Mrs. Thomas' private and locked box, where she found it,—"He could not resist the temptation of displaying it."

Certainly this is neither plausible nor ingenious.

But complainant failed to establish that the Exhibit was not found until Monday.

32 Mr. Dunton's testimony is direct, that upon his arrival at Camden on Saturday afternoon, he first called on his brother, Washington Dunton, told him what he had come for, and asked him if *he* recollected ever seeing him use such a pencil, or if *he* ever had one. That then he went to Mrs. Thomas', and told her what he had come for, but seeing that she was hard at work, told her she needn't look then, and went away. That when he came back, in about an hour, she gave him two pencils, one of them Exhibit E; (fols. 763-764, p. 427).

George Washington Dunton confirms him so far as re- 33
lates to himself, and adds that he said "he was going up to Mrs. Thomas' to see if he could find one there." He also testifies that he said "he should go to Lincolnville and Appleton to see if he could find Maxey R. Gushee, as he let him have a pencil of that kind he remembered of."(fol. 612, p. 342).

To meet this, complainant produced Mrs. Barbour, a widow, the daughter of Mrs. Thomas, who testified (A. to Q. 22, fol. 95, p. 51) that *she* did not know of Dunton's 34
saying anything about the pencil until Monday evening; but, on cross-examination (fol. 97), she admits that she was not present all the time.

It is true that, after defendant's rebutting proofs were closed, complainant succeeded in procuring from Mrs. Thomas a deposition to the effect that she gave Mr. Dunton Exhibit E on Monday evening instead of on Saturday, and that Dunton first asked her to look for it on Monday, but she admitted that she had signed a paper 35
to the effect that it *was* Saturday night (fols. 279, 281, pp. 157, 158—159.)

But this is to be considered in connection with the testimony of Mr. Thacher, one of defendant's counsel in Boston, who testifies that Mrs. Thomas told him on July 3, 1873 (Mrs. Thomas' deposition referred to was taken October 30, 1873), Mr. Dunton being present; that she could not say it was not Saturday; that she never should deny that she gave it to him on Saturday; and that the state- 36
ment she had signed must remain undisputed; and that if called on to testify by the other side, she should swear that she could not remember when she found it.

(Aa. to Ints. 3, 4, Cross-Int. 8, pp. 482, 483.)

Mr. Dunton corroborates this, produces and states the circumstances under which Mrs. Thomas signed the card, defendant's Exhibit Z Z, to the effect that it was Saturday night (fols. 868–869, pp. 483–484), and further testifies (A. to Int. 10, fol. 870, p. 484). "I asked her what

her idea was in changing so often. When she would see me she would be one way, and the next time she would be the other way. She said that Sarah, her daughter, Mrs. Barbour, wouldn't let her testify that way, or state that it was on Saturday. She also said, "What do you care about the case? Let Mr. Illfelder have it." I said that I cared nothing about it any farther than my testimony, which I'd sworn to, and which was true."

And (A. to Cr. Int. 5, fol. 871, p. 485.)

"Mr. Thacher and she had quite a conversation in regard to the time. She stated that she gave me the pencil on Saturday, and that the paper that she gave me on the evening of the day that her daughter testified—Mrs. Barbour—must stand as it was, and that if she was called upon to testify on the other side, that she didn't know whether it was certainly on Saturday or on Monday; but she had come to the conclusion that it was on Saturday. That she was a good deal mixed about it, there had been so much talk, and could hardly tell, herself, when it was, but she had come to the conclusion that it was on Saturday."

And there is no contradiction of what is thus testified to by Mr. Thacher and Mr. Dunton, to which there is not the slightest allusion in appellant's brief.

In this connection, the cross-examination of Mrs. Barbour herself is significant. It appears that she was procured as a witness by Joseph Illfelder, he being introduced to her by her brother, the same Silas C. Thomas, who, after having been a witness for defendant, was, through the agency of the private detective and lawyer, taken by Illfelder into complainant's employment, at a fixed salary, to procure testimony for him. It appears, too, that, thereafter, an apparently very intimate social acquaintance continued between Illfelder and Mrs. Barbour (fols. 97-98, pp. 52-53; deposition of Joseph Illfelder, Aa. to Q.18, p. 134, Q.90, p. 176.)

However, whether Mrs. Thomas gave Exhibit E to Mr. Dunton on Saturday or on Monday, she does positively

testify that Exhibit E had been in the box in her bureau since 1855 or 1856; that Mr. Dunton then left it at her house; that she remembers putting it into her box, and finally, which is not even alluded to, that she *saw* it in her box a few weeks *before* Dunton came to Camden and got it. (fol. 423, p. 239; A. to Cr. Int. 17, fol. 426, p. 241; fols. 422-423, p. 239.) 41

This is fatal to appellant's theory of itself, in any event.

7. The testimony of complainant's witnesses, Joseph P. Waterhouse, Lyman B. Hanaford and William M. Scribner, is claimed (pp. 70 *et. seq.*) to directly contradict the testimony of Dunton and his witnesses as to his knowledge and use of such pencil-erasers. 42

An examination of the depositions of these witnesses will show their animus and the unreliable character of their testimony, aside from its being, at the best, merely negative. 43

JOSEPH ILLFELDER states that *Silas C. Thomas referred* him to Waterhouse (*Complainant's testimony*, fol. 235, p. 133). He also admits that Waterhouse has been *employed* for complainant in this case by him, and *paid* for *services* rendered. (Aa. to Re-D. QQ. 124, 129, fols. 319, 322, pp. 180, 181); and Waterhouse *himself* first evades and then admits it. (Fol. 800, p. 448.)

WATERHOUSE'S testimony is only that he does not *remember* seeing Dunton have or use the pencil-eraser during the *two or three months* he was with him in the Fall of 1853, (Aa. to QQ. 8, 9, fol. 123, p. 67); he states he left Dunton's employment because he did not consider the compensation he got equivalent for the service (A. to X-Q. 25, fol. 125, p. 69); and he further states that he don't recollect of Dunton's getting up any *large writing charts*, and don't think he worked in getting up any *writing books* at the time *he* was there (Aa. to X-QQ. 35 44

45 36, fol. 126, pp. 69, 70). The testimony on part of defendant is, that it *was* in getting up charts and writing books that Dunton used these pencil-erasers in his rooms at that time.

HANAFORD's testimony is specially with reference to the *few weeks* he claims to have, also, been employed by Dunton, in August or September, 1853 (Aa. to Q. 5, X—Q. 29, fols. 177, 181, pp. 100, 102); that, after that, he was employed by Mr. French in his school, until near the 1st of
46 May, 1855, and met Dunton occasionally on the streets and in book stores (Aa. to QQ. 10—12, fol. 178, p. 100); that from May 1, 1855, J. W. Payson and he carried on a Mercantile Academy together for some five or six years; and that he "*thinks*" Dunton called occasionally; and "*thinks it probable*" he met Mr. Dunton at Mr. French's, but has "*no definite recollection*" (Aa. to QQ. 14–16, fol. 179, p. 101); he "*thinks*" he never saw Dunton use a pencil with lead in one end and rubber in the other; has *no recollection* of it (Aa. to QQ. 18, 19, fol. 179, p. 101); he admits
47 that said J. W. Payson is the same man who was connected with Mr. Dunton's brother Seldom, and that there has been a dispute between Seldom Dunton and Payson, on the one part, and A. R. Dunton, on the other, for years, with regard to copy-books (Aa. to X-QQ. 26, 27, 28, fol. 181, p. 102); he *thinks* he saw Dunton draw a few designs on cards, but says, "*I am not sure*" (Aa. to X-QQ. 41–43, fol. 182, p. 103); he says there was "*nothing in particular*" to call his *attention* to the kinds and peculiarities of the pencils Dunton so used in drawing (A. to
48 X-Q. 47, fol. 183, p. 103); that he shaded or blended the marks or lines by repeated strokes of the pencil or style, "*as far as I remember;*" and that that is the only way "*that I remember*" (Aa. to X-QQ. 48, 49); he further admits that both he and Payson having been employed in French's school, left it, and set up a similar school *in opposition;* that there was *ill-feeling;* says *their* school had more students and was more flourishing, and some of *his* pupils left and came to *them;* and *their* school also *competed with Mr. Dunton's* (Aa. to X-QQ. 57-62, fols, 184-185, p. 104.)

SCRIBNER professes in his testimony to cover the *whole* 49
time and *all* the time from February, 1848, to January, 1856.

He states that he was associated in business with Dunton until July, 1854, and that during that time they lived together and had their trunks in common, and were together in the same places all that time, teaching (Aa. to QQ. 5–10, 19–22, fols. 224, 225, pp. 126, 127).

In this, Scribner is *contradicted* by Waterhouse himself, who testifies that he is acquainted with Scribner, and that when he was employed by Dun- 50
ton, as he testifies, in 1853, he has no recollection of seeing Scribner either in Dunton's room or in Boston, but to the best of his recollection Dunton told him Scribner was in St. Louis (Aa. to QQ. 4–8, fol. 799, pp. 447-448).

GEORGE H. BUNDY testifies that he was engaged at Dunton's establishment for six or eight weeks, commencing January or February, 1853, and that Scribner was not regularly there; that he understood he had a writing-school out of town, which he 51
was teaching (Aa. to QQ. 2–7, fol. 727, p. 407).

DANIEL O. QUIMBY testifies that he was employed as a teacher at Dunton's rooms, November and December, 1853, and a part of January, 1854 (A. to Q. 7, fol. 706, p. 395), and that he does not know of Scribner's being present, or in attendance, at said Dunton's writing rooms during the time he was employed there (A. to Q. 17, fol. 709, p. 396).

52

SCRIBNER is the *only* witness that *asserts positively* that Dunton did *not* use such a pencil; he does so *without qualification* (A. to Q. 23, fol. 225, p. 127).

He states he remembers Dunton's making writing charts, and that he generally gave the letters in the rough, and then they were finished by such pencil artists and lithographers as he could get to aid him; that Meisel was one (A. to QQ. 16, 17, fol. 225, p. 127).

53 In this he is *directly contradicted* by the person *referred to,* the lithographer, AUGUSTUS MEISEL, produced by defendant, who testifies that he copied the letters made by Dunton exactly; that Dunton did not give them to him in the rough, and he did not then finish them; that Dunton's copies were never changed in any way, or required to be finished or touched up by witness when given to to him. (Aa. to QQ. 6, 7, fol. 754, p. 422.)

He is, *also, contradicted* by L. H. BRADFORD, a
54 lithographer, formerly a member of Tappan & Bradford, and who testifies that he engraved the chart, defendant's Exhibit "O"; he states the copy furnished by Dunton was perfect, and that Dunton was a very particular man (A. to Q. 5, fols. 796, 797, p. 446).

JOHN M. WHITTEMORE, also, testifies that Dunton furnished his copies to the engravers in a perfect state, so far as his knowledge goes; and that the difficulty was that they were too perfect; that it
55 was difficult for them to make their work as perfect as his writing. (AA. to QQ. 20-22, fol. 739, pp. 413, 414.)

Thus the attempt to show by this witness Scribner, that Dunton did not finish his letters himself, which Dunton and many of defendant's witnesses testify he finished by means of these pencil-erasers, is completely confuted, and shown to be false.

SCRIBNER further testifies that he is sure Dunton was
56 in Boston and immediate vicinity in 1855, up to December; that he saw him continually all that fall in 114 Washington street, quite every day; being asked, (X-Q 86 p. 131), "Is it possible that you will venture to swear that you saw A. R. Dunton every single day during the whole fall of 1855?" he answered, "I should think I could very positively," and he states it was on the streets and in bookstores he saw him every day during the fall of 1855 (Aa. to QQ. 19-22, fol. 225, p. 127 to X-QQ. 81-83, fol. 230, p. 130 to X-QQ. 92-94, fol. 232, p. 131).

Such testimony as this is simply *impossible* and *reckless;* that Dunton was absent after he was married, which was on October 8, 1855 (Defendant's Exhibit LL, fol. 890, p. 495), and especially at Camden and Lincolnville and vicinity, in Maine, in November, 1855, is proved conclusively by the numerous witnesses already referred to. 57

SCRIBNER states on cross-examination, that, after his connection with Dunton ceased, he went into business with the publishers of the copy-books which were the 58
rivals of Dunton's, and as to the authorship of which there has been, and still is, a controversy; that he is the same Scribner who was, and is, a member of the rival firm of Scribner, Dunton (Seldom) & Payson, (the same Payson who was Hanaford's partner); that his firm of Scribner, Dunton & Payson commenced in 1855, and exists still the same and for the same purposes as it has since its commencement; that Crosby, Nichols & Co. were the publishers of their copy-books, and their successors Woolworth, Ainsworth & Co., the present pub- 59
lishers; that his said firm claimed to be the authors of what A R. Dunton claimed to be the sole author of; that a very acrimonious contest has been going on between his said firm and A. R. Dunton on that subject; that there is a suit at law still pending between their respective publishers on that subject. (Aa. to X-QQ. 39-70, fols. 227-230, pp. 128-130).

And yet Scribner, after some evasion, states that he don't know why he is not on friendly terms with A. R. Dunton, and denies that he has ever had any trouble or 60
words with him; and states that the last time he saw him, which was about January 1, 1856, in Boston, on the street, he was on friendly terms with him (Aa. to X-QQ. 73-78, fol. 230, p. 130).

Scribner also states the occasion of his seeing Dunton every single day during the fall of 1855 was Dunton's efforts to get him to engage in selling his copy-books, and to become his partner, fearing he would leave and go

61 with other parties, or make books for himself—Scribner —alone (Aa. to X-QQ 87, 88, fol. 231, p. 131); and that Dunton was continually importuning and desiring him not to join in the Payson & Dunton copy-books, and acknowledged that he had not treated him right in the past (A. to X-Q. 83, fol. 231, p. 130); and yet in the very last preceding answer, Scribner states that his firm of Scribner, Dunton & Payson had, *in fact*, *previously* commenced in the August before (A. to X-Q. 82).

62 Mr. Dunton, in his testimony, absolutely denies that, after the last of July or first of August, 1855, which was the last time he saw Scribner that year, he sought any interviews with him during the remainder of that year, and this is rendered probable by the fact, as stated by Scribner himself, that in August Scribner became a partner in the rival firm of Scribner, Dunton & Payson.

63 Mr. Dunton also testifies that, after his interview with Scribner the last of July or first of August, 1855, he next saw him in Brooklyn, N. Y., in 1857 or 1858, and had a personal contest with him on account of Scribner's slandering him, which resulted in his knocking Scribner down, and has never spoken to him since; and he denies that Scribner ever at any time had any interest in his copyrights, or that they ever used the same trunks (Aa. to QQ. 15-23, fols. 761-763, pp. 426, 427).

And complainant has not attempted in any way to rebut Dunton's testimony in these respects.

64 It is claimed on behalf of defendant that the testimony of this witness, Scribner, is entitled to no weight whatever upon *any* point as to which he has so recklessly testified, both because it is intrinsically *without credibility*, and because it is in all important respects *contradicted* by many other witnesses.

It is evident that the complainant has gathered the materials with which to make an attack upon Mr. Dunton, and if possible, *prejudice* him in the eyes of the

COURT from his *personal* and *business enemies* and *rivals*, 65
and has produced *them* as the witnesses upon whom he relies. Such testimony is always to be distrusted, and in this case it should be, under the circumstances, entitled to no weight whatever.

V. As farther error it is charged in appellant's fourth assignment of error, that the grounds upon which the patentability of complainant's patents was questioned 66
by the court below are erroneous.

It is not deemed necessary to add anything affirmatively to what is already contained in respondent's brief in relation to this point; but it is considered proper to refer to some of what are considered errors or misapprehensions and inapplicable citations contained in appellant's brief.

1. As to the doctrine advanced (pp. 86 *et seq.*, 89 *et* 67
seq.), that, independently of any question of the combination or aggregation of its parts, it does present "a novel combination of useful qualities" which gives it patentability.

Lupton's Appeal, 5 Off. Gaz., 489, is cited, and seems to be principally relied upon to sustain this.

The article in that case was the product of a process. It was in no respect a combination or an aggregation, but a single thing. It had, indeed, certain useful qual- 68
ities united in it, but, in no sense, a *combination* of useful qualities. Its useful qualities were derived from the *process* by which it was made, and it was shown that none of the other processes previously known did or could produce it. But these united useful qualities all of them pertained to it, and every part of it, as a single article —a stove-pipe elbow—and not some to one and others to another separate or distinct part of a combination or aggregation.

69 And as said by Commissioner LEGGETT, "The elbow thus formed is in every respect like a common straight joint of pipe, except that it is curved. No such stove-pipe elbow has ever been made before."

And the case was decided on the principle that a patent may be granted for the product as well as for the process, provided the product be new in itself.

It is submitted that this reference is not applicable.

With regard to the decision in the *Russell and Erwin Manf. Co.* v. *Mallory*, cited (pp. 90, 91), in quoting from
70 Judge WOODRUFF's opinion, important portions are omitted.

Judge WOODRUFF also said:

"It is manifest from the whole specification and claim that the inventor here had no idea of claiming a combination of a lock with a latch as an invention. His specication shows that the reversible latch, constructed as described, to be used in connection with and enclosed by the lock case, was the improvement which he had made."

* * "His patent is not to be held invalid, because he
71 only claims it when used in an outer case, containing only lock mechanism, if, in fact, his improvement was patentable; not even though there is no relation in the operation of the two, and no effect from the combination, which either, separately, would not produce. Nothing in the case cited forbids an inventor of a new device from taking a patent under a claim, narrowed as closely as he sees fit, and however much narrower than he might have claimed, the patent is valid."

72 This is enough to show the want of applicability of this reference to the present case.

In *Sherman's Appeal*, 7 Off. Gaz. 1054, also cited, it is true that, while sustaining the doctrine of the non-patentability of a mere aggregation and the claims to that effect, the acting Commissioner did allow the 6th and 7th claims, as covering the *precise arrangement of parts* shown in the drawings.

It may be doubted if, even to this extent, limited as it was, the decision will bear the test of principle and

authority, but it is sufficient for the present case, that Lipman claims a combination similar to that disallowed by the Commissioner in that case; and if Lipman is to be limited to *his* precise arrangement of parts—provided *that* was novel, which is denied—defendant has not infringed. 73

It is not perceived in what respect Judge NELSON'S charge in *Hall* v. *Wiles*, 2 Blatch. 194, cited in appellant's brief, (pp. 92-93,) is applicable to this question of patentability. 74

In that case, a combination was claimed of the carriage E with the connecting rods and shaft; there was, also, claimed the peculiar construction of the carriage E, and in combination therewith the movable carriage F, constructed and operated as described. Judge NELSON charged, that "If the carriage E, which is one part of the combination as arranged by the patentee, is a new and useful improvement, the combination of that with the connecting rods and shaft, for letting it down and freeing it from obstructions, will be maintained, though the latter may be old. Because, one part of the combination being new, the uniting that with an old contrivance makes the combination necessarily a new one." 75

And, therefore, he left to the jury the question whether the carriage E, as constructed by the plaintiff, was or was not new, and if they found it to be a substantial improvement upon all previous constructions, then he left the question to the jury whether the carriage, used by the defendant, was identical with that of the plaintiff. 76

2. But it is further argued (pp. 93, *et seq.*), that the Lipman invention does, also, disclose a veritable combination, inasmuch as each of the combined implements shown in the patents, performs a new and distinct function, viz.: that of furnishing a handle for the other; and, also, because of the convenience of their juxtaposition.

77 It is not considered necessary to discuss this question, as matter of law, further than it has already been in respondent's brief, but it is submitted, that it is not strictly correct, as matter of fact, that each furnishes a handle for the other.

Lipman's alleged invention is limited to the combination of the lead and rubber in an ordinary drawing pencil; and while, in a sense, the pencil may be considered as a handle for the eraser, the eraser is in no sense a handle for the pencil. The most that can be said is that
78 the ordinary pencil-case is the holder of both the lead and the india-rubber.

3. The case of *Stanley Works* v. *Sargent* 8, Blatch, 344, is cited (p. 107), to sustain the point that the alleged great utility of the alleged invention is strong evidence to show genuine invention.

But in that case, it was expressly found that Hart's in-
79 vention was clearly *new*, and that the references cited against it were widely different in construction.

Moreover, even greater utility and public appreciation was shown in the case of the Blair patent.

4. As respects the cases of patents which have been granted and sustained for articles of manufacture, referred to in appellant's brief (p. 108), it is submitted that there is nothing contained in them contradictory to or inconsistent with the principles and adjudications,
80 with reference to the question of patentability, referred to and cited in respondent's brief.

VI. The argument in appellant's brief, in support of the validity of the patents in question, not only as a question of patentable subject matter, but, also, as one of novelty, is made to depend largely upon the construction given to Lipman's patent, viz., that an enlargement of the groove containing the india-rubber is an essential

feature of the invention. That, in fact, it is a new device 81
for effecting the union of the lead and india-rubber, consisting of "two grooves arranged at different ends of the same sheath, each groove being suitable for different purposes, and one being, therefore, larger than the other, and having a different length relatively to the other." (p. 100.)

Even were such construction a correct one, it would not make the alleged invention patentable, within the principle and adjudications referred to, nor could defendant's pencil-erasers be considered, in any fair or proper 82
sense, similar.

But, as already shown in respondent's brief, such a construction was not understood nor intended by Lipman himself, is not claimed or expressed in or to be derived from any language contained in the specification, and is contradicted by the testimony of complainant's own experts. Indeed, it is simply and only an argument of counsel, rendered necessary by the exigencies of the case, and without any basis, save in the slight enlarge- 83
ment of that part of the groove containing the rubber, apparent in the drawing; and, on the authority of the decision of this Court, in *The Rubber Tip Pencil Company* v. *Howard et al.*, 20 Wall., 498, that is insufficient.

1. But, as matter of fact, as shown in respondent's brief, even such relative enlargement was old. And, in this connection, it is proper to refer to the quotation from the testimony of James A. Page, head-master of the Dwight School in Boston, in appellant's brief, (pp. 84
13-14,) in which Mr. Page's statement in answer to Int. 5, "How large was that section of rubber as it appeared at the end?" that it was "A little larger than the size of the lead," is deliberately omitted. Mr. Page's whole answer was, "A little larger than the size of the lead; about the size of the lead; my impression is, a little larger." The first clause is omitted in appellant's quotation. The last word was not "*longer*" as it appears in the printed record, but "*larger*," and so appears in the manuscript

85 copy of the original testimony, in counsel's possession Moreover, "*longer*" would be absurd as indicating that the rubber was longer than the lead.

2. Nor, as matter of law, does it meet the test of patentable novelty, within the requirements of the patent law.

In this connection, the statement in appellant's brief (p. 125,) that "When a change of form confers structural advantages, it is the proper subject of a patent," is incorrect; for, while recognizing *utility*, it ignores *patentable*
86 *novelty*.

And in each of the four cases cited, it was ruled that a *different* and *new* result was secured by *different* and *new* means. Thus they are, in no respect, inconsistent with the cases cited in respondent's brief (p. 26–27), which establish that the new effect must be different *in kind*, not simply in *degree*, and that *utility* or even *greater* utility is not enough.

87 It is respectfully submitted, that appellant has failed to demonstrate the alleged errors of the Court below.

JOHN S. WASHBURN,

Counsel for Respondent.

Supreme Court of the

United States ~~Circuit Court~~,

~~SOUTHERN DISTRICT OF NEW YORK.~~

IN EQUITY.

JOSEPH RECKENDORFER,

Appellant

vs.

EBERHARD FABER.

Appellee

BRIEF

ON POINTS OF LAW, FOR DEFENDANT,

By GEORGE GIFFORD.

JERSEY CITY.
PRINTED BY JOHN H. LYON.
1874.

Supreme Court of the

United States ~~Circuit Court,~~

~~Southern District of New York~~

Joseph Reckendorfer,

vs.

Eberhard Faber.

I.

The things patented by the Lipman and the Reckendorfer patents belong to a class of changes which do not involve invention, but are the products of only mechanical skill, or belong to those which are so obvious as not to involve even mechanical skill.

There is a definable and a defined class of things which are the products of inventive genius, and a class which are the products of merely mechanical skill, and others which are so obvious as to require neither genius nor skill to produce.

In effecting changes in articles and materials employed in the useful arts, two functions of mind are employed. One is the inventive faculty, and the other is mechanical skill. They are the genius of the inventor, and the skill of the mechanic. The law, by numerous adjudications, has repeatedly recognized:

1st. The distinct existence and operation of these two functions or faculties of mind, and their independent use in shaping and fashioning matter to increase its usefulness.

2d. A difference in the products of these two functions or faculties of mind, holding the one to be patentable and the other not.

Tatham vs. *Le Roy*, 2 *Blatch.*, 486.
Law's Digest, 478.

It is often difficult to trace the line between the products of the two, and to determine where the skill of the mechanic leaves off, and the genius of the inventor begins. But notwithstanding that difficulty, the two have a distinct existence, a distinct operation, and produce distinct results, and this has been repeatedly affirmed and acted upon by all courts, both in this and in foreign countries.

The following propositions are well settled law, and cannot be denied:

1st. That the products of mere mechanical skill are *not* subjects of patents.

2d. That the products of inventive genius *are* subjects of patents.

3d. That an accidental discovery of an improvement which is neither the product of inventive genius nor of mechanical skill may or may not be patentable, depending upon its nature. In case the improvement is such that in the absence of accident, its production would have required the exercise of inventive genius, then it is the subject of a patent, but if, on the contrary, the thing accidentally discovered is of such a nature that without the accident it would not have required more than the skill of a mechanic, it is not patentable. The reason of this is, that an improvement of the former kind rises to a higher dignity than the products of mechanical skill, and is of a *kind* which belongs to patentable subject matter, and being the production of the one accidentally discovering it, a patent is due him.

In determining to which class the change belongs, reference must be had to the effect as well as the means. It is one of those cases wherein *Curtis*, sec. 39, third edition, says, that according to the English authorities, the amount of invention "may be estimated from a compound view of

the change effected, and the consequences of that change."

A very important agent employed in the manufacture of vulcanized India rubber, and without which rubber cannot be vulcanized, is the use of sulphur mixed with rubber, and it originated in a dream of Nathaniel Haywood. It, however, was patentable, because he produced it, and because it was a thing, the use of which required experiment, and could not have been discovered by merely mechanical skill.

No changes or improvements, which are *obvious*, can rise higher in dignity than to belong to the products of the mere skill of a person acquainted with the art or manufacture to which the change belongs; and as already stated, there is a class of changes which are so obvious and so low in the scale as not to require even skill. To this class belongs the thing patented by Lipman and by Reckendorfer. If a man have two sticks, with a piece of rubber in one end of one of them, and a piece of lead in one end of the other, it cannot require even skill to put the rubber into one end of the stick containing lead, or to put lead in the end of the other. Nor, if a hole is too small for a pin or a piece of rubber, can it require even skill to make it larger; nor if the stick is too small for an enlargement of the hole, can it require even skill to get a larger stick; and if a wooden handle is so large as to be inconvenient, can it require skill to make it smaller?

That there are changes made in things which are *novel* and also *convenient*, and yet which are not patentable—because they are not of such a character as to involve or require the exercise of inventive faculties,—is a well settled principle of the patent law.

Ransom vs. *Mayor, &c., of New York, Blatch.*
Tatham vs. *Le Roy*, 2 *Blatch.*, 486.
Hotchkiss vs. *Greenwood*, 4 *McLean*, 461.
See Curtis on Patents, Secs. 32 *and* 468, *third edition;* where the following is stated:

"It may not be necessary that there should be positive or direct evidence of the expenditure of more or less thought, design, or ingenuity, or of a greater or less degree of exer-

cise of what is sometimes called the inventive faculty. Still, it may be important to see that the possibility of there having been an exercise of that mental process which is called invention, is not excluded."

This doctrine was also applied by Chief Justice Taney, in the case of *Larabee* vs. *Carlton*, 3 *Fisher*, 5; tried in 1851.

The invention claimed in that case consisted of the combination of a movable reservoir, with a jet bath. The disclaimer and claim read thus:

"I do not claim the jet bath, neither do I claim the moveable reservoir, both having been used separately, before; but I do claim and desire to secure the combination of a movable reservoir, with a jet bath, constructed as therein described."

It appeared on the trial that the following things were old:

1st. A movable reservoir, separate from a jet bath.

2d. A jet bath, separate from a movable reservoir.

3d. The combination of a stationary reservoir with a stationary jet bath.

It did not appear that a *movable* reservoir had ever, before the invention of the patentee, been combined with a jet bath. The Chief Justice charged the jury that, in view of these facts, the patent, to be valid, must be limited "to the construction of the two known improvements, in the manner described in the specification;" and that, if the patentee's mode of connecting and combining the jet bath with the movable reservoir was substantially the same with that by which the jet bath and stationary reservoir were united together, then the patent was invalid; or that "if a mechanic of ordinary skill and acquaintance with such business, with the old improvement before him, could have attached the jet bath to the movable reservoir, in a manner that would produce the same result with that adopted by the plaintiff, then, the improvement he claims to have invented is not patentable, and his patent is invalid.

Here was something new—a grouping of elements never

before made. It was the bringing together, for the first time of a movable reservoir and a jet bath, and this production was convenient and useful; yet, because it was so obvious as not to involve invention, or call into exercise the inventive faculties, it was held not to be patentable subject matter.

In the case of *Charles C. Stimpson* vs. *Charles T. Woodman*, 10 *Wallace*, 117, decided by the Supreme Court of the United States, the patent was for an improvement in a machine for boarding or pebbling skins or leather. The claim in controversy reads thus:

"Boarding or pebbling skins or leather by means of a single short cylinder, rolling over a table with the requisite pressure substantially as described."

It appeared in evidence:

1st. That a roller for the same purpose, and having the required design or figure engraved upon it, had been used by hand prior to the invention by the patentee.

2d. That a smooth roller had previously been used for pebbling leather in the machine, where the patentee used the figured roller; that is, that the alleged invention of the patentee consisted of the use of the figured roller in the machine, instead of the smooth roller.

The defendant's counsel, on the trial in the Circuit Court, requested the Judge to charge the jury, that—

"If they found that the form of the surface of the roller in the plaintiff's machine is not material to the mechanical action of the roller in combination with the other devices and their arrangements by which the roller is moved, the leather supported and the pressure made, and if they find that before the plaintiff's invention, a machine was known and used, not differing substantially from the plaintiff's machine in any other respect, but having a roller for giving a finish to leather, the surface of which roller was different from that specifically shown and described in plaintiff's patent, and if they find that before the plaintiff's invention, rollers having such a surface as the plaintiff's substantially, were known and used in other machines for the same purpose, the plaintiff's patent for the first claim is void."

The Circuit Court not considering such to be the law, refused to so charge the jury. In consequence of such refusal, the case was carried up and the Supreme Court decided that the Circuit Court was wrong in refusing so to state the law to the jury, and held that the law as stated by the counsel in his request to have the Judge charge the jury was correct.

The Supreme Court in the decision abbreviated this statement of the law, and stated it in their own language thus:

"If the plaintiff's machine had been anticipated in every part of its construction except the figures or designs on the roller, which roller was old, he was not entitled to recover, the patent being invalid."

The head note in the report of the case in Wallace, is as follows:

"Where a roller in a particular combination had been used before without designs on it, and a roller with designs on it had also been used in another combination, it was not a patentable invention to place designs on the roller in the first named combination. Such a change, with the existing knowledge in the art, involved simply mechanical skill, which is not patentable."

The doctrine of this case is plain and unmistakable. We first have it in the request of the counsel in the court below, and a refusal of the Judge to receive or adopt it as law. We next have the decision of the Supreme Court, holding expressly that it was good law, and that the Judge of the court below erred in refusing to so charge the jury. The doctrine of this case completely annuls both the Lipman and the Reckendorfer patents. Here it was acknowledged that Woodman put things together which never had been put together before. He had put a figured roller into a machine where it had never been before, the union was therefore new and the usefulness of it was not denied. The patent for it was declared void, not because the union was old, and not because of want of utility, but the patent was declared void because the change did not require invention but involved only mechanical skill.

What becomes of the Lipman patent when tried by the law of this case? If it did not require more than mechanical skill to introduce a roller into a machine of a kind which

had never been in the machine before, and which enabled the machine to do what it had not done before, did it require more than mechanical skill on the part of Lipman to introduce a piece of rubber into one end of a pencil, or to take the rubber eraser, like Exhibit S, which was known, and put a piece of lead into one end of its wooden case, in the same way that was in common use in other wooden cases? Is it not even underrating mechanical skill, to assume that even *it* was necessary to make such change? If it did not require invention to introduce a roller into an operating machine, where it had never been before, could it require invention to tie together a handle which contained rubber, and a handle which contained lead; or, could it require invention on the part of Reckendorfer to make the end of the stick larger because a larger hole was needed in it, and to have the other end small because there was no need of enlarging it? Putting a piece of lead into a handle to mark with, or a piece of rubber to erase with, or attaching the handles together to have a common handle for the two, or enlarging a stick to admit of a larger hole in it, or reducing the size of a handle because of its being too large to be convenient, is merely complying with the necessity or demand of the case, and does not employ even skill, much less inventive genius. What kind of *skill* do such changes require?

II.

The patent to Lipman is invalid, because it is not for patentable subject matter.

FIRST.

The elements of the combination claimed are not in patentable combination, because they have no reciprocal action or co-operation, and there is no new or improved result produced by their union. They constitute a mere aggregate of elements.

The doctrine on the subject of patentable combinations laid down in *Hailes* vs. *Van Wormer*, 7 *Blatch*, 443, and affirmed in *Sawyer* vs. *Bixby*, 9 *Blatch*, 338, in *Sarven* vs. *Hall*, 9 *Blatch*, 553, in *Russell & Erwin Co.* vs. *Mallory*, 10 *Blatch*, 146, and also by the Supreme Court on an appeal of the first of these cases is the law applicable to this patent. The Supreme Court, in their recent decision in *Hailes* vs. *Van Wormer*, fully sustain Judge Woodruff, and say: 20 How. 353.

"It must be conceded that a new combination, if it produces new and useful results is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention."

In speaking of the elements of the combination, the court adds:

"Each produces its appropriate effect unchanged by the others. That effect has no relation to the combination; in no sense can it be called its product. Thus far nothing novel is produced. This, then, is a mere aggregation of devices, not invention."

The law in *Hailes* vs. *Van Wormer* is plainly stated, and a clear discrimination is there made by Judge Woodruff between what constitutes a patentable combination and what is a mere aggregation of elements.

The court there defines what is a mere aggregation of elements and not patentable, and what is a patentable combination. The former is defined thus:

"The mere addition of an old device producing a specific result to another old device producing its own result in such wise that their combination produces those same two results and no other, is not invention."

A patentable combination of elements is defined thus:

"On the other hand, if the combination itself produces a new and useful result not due to the separate action of either nor attained thereby, but due to the co-operative or reciprocal action of the combined devices, a totally different question arises."

To ascertain whether or not the lead and the rubber claimed in the Lipman patent, are in patentable combination, is only to determine which of these two classes so defined by the court they belong to. This it will not be difficult to do. A plainer case coming within the class of unpatentable aggregations of elements and excluded from patentable combinations as defined by the court, can not be produced. Its unpatentability can therefore be shown in two ways.

1st. It is exactly such a condition of elements which the court declares is unpatentable.

2d. It is destitute of any of those properties or attributes which the court holds to be indispensable in a patentable combination.

The elements were both old. The lead and all its properties and functions were old. The same is true of the rubber; there was no new or improved element. Every property of the lead or the rubber which the patent requires the use of was not only well known, but was familiar to everybody. There was no new or modified result produced by uniting these old elements. Neither affects the use of the other. Their functions are as distinct and as independent of each other as they are without being united. After the union is effected the lead does just what it did before, and in exactly the same way, unchanged and unaffected in any degree by the rubber or by its union with the rubber. The rubber also does the same and in the same way in all respects in the union as it does out of it, unchanged and unaffected by the lead. The union neither changes the function of the lead nor does it change the function of the rubber, nor does the union effect any new or modified result. While the rubber is being used the lead might as well be disconnected from it, and while the lead is being used the rubber might as well be disconnected from it.

1st. There was known and in use a piece of lead having a handle.

2d. There was known and in use a piece of rubber having a handle.

3d. The alleged invention consisted only of connecting those two handles, and it is immaterial by what means they are united. They may be spliced and riveted, or they may be glued, or they may be joined in any other possible way and still be within the claim of the patent. All that is necessary is to have a continuous handle common to both.

Can it be pretended that a man having both the pencil and the eraser lying before him on a table, could, by picking them up and tying them or otherwise fastening them together, have a valid patent for the combination of the lead and rubber.

The alleged invention involved in *Sawyer* vs. *Bixby*, was a cylindrical box having small perforations at one end, and having the perforations covered with paper or wax. The court held the alleged invention unpatentable, and in so doing, in reference to the parts of the apparatus, said: "They are old means, and they produce these old and obvious well-known results. In combination there is no other effect. Each performs the same office, in the same manner, as it does when employed for any other purpose, and precisely as it must, whatever be the form of the package, or the particular use to which the package is applied. The employment of these instrumentalities, in putting up packages for transportation is, therefore, the exercise of judgment in selecting, not of invention in devising or combining. At most it consists of applying old devices to a new use, which, when it involves no new means and produces no new effect, is not patentable, notwithstanding it may be useful to combine the two results by uniting the two instrumentalities."

There are many things which fall within the class that the court terms a mere aggregation of elements, and therefore, not patentable as combinations.

A table knife and fork both have handles, and each has its peculiar function, but no one could have a valid patent for the combination of the knife and fork by connecting their handles together, or by in any other way giving them a han-

dle common to each. Take a hammer and a screw-driver; each of them has its function, and each has a handle. Can one go to a carpenter's bench, pick them up, connect their handles, and then take a valid patent for the combination of a hammer and a screw driver? A paint brush has a handle, and so has a putty knife. Both are used by painters; one to stop holes with putty, and the other to apply paint. But no patent could be sustained for the combination of the brush and knife by virtue of splicing their handles together.

A claw at one end of a handle to draw a nail, and a hammer on the other end of the same handle, to drive a nail, have long been used, but no one has ever supposed that there could have been a valid patent for such a combination of claw and hammer.

A pruning hook and a spade have handles, but who has ventured to suppose that by splicing the handles, he could have a patent for the combination of the spade and the pruning-hook?

A spear, for spearing fish, has a handle, and so has a scap-net, for catching fish; splicing these handles, would not entitle a party to a valid patent for a combination of a net and a spear.

A pitchfork and a hay-rake have handles, but splicing their handles, would not entitle a party to a patent for the combination of rake and fork.

These are all cases identical in principle with that of splicing the handle of the lead with the handle of the rubber, and in none of them could there be a valid patent for a combination. Because, in none of them is there any new or improved function produced by the union; and in none of them are the functions of the individual parts changed or affected by the union, and therefore in none of them is the union patentable as a combination.

In all cases, where the office of each part is performed without influence or aid from any other, and just the same result is produced by each part as would be if they were disconnected; there is no patentable combination, but mere aggregation of parts.

To bring a case within the class which the courts define to be patentable combinations, there must be some result

other than the parts being hitched or fastened together; something more than the mere aggregation of the parts. To make a patentable combination, there must be some fruit resulting from putting them together. This may be reciprocal action of the elements, or the creation of a new function by the combination. To bring a case within the class which the court defines to be patentable combinations, there must be some fruit resulting from putting the parts together; the parts must co-operate in doing something. There are instances of this kind, and which are easily distinguishable from those belonging to the class of mere aggregation. Take, for illustration, the simple case of the combination of two wheels by an axle-tree; the two wheels, by their joint operation, will have a function, and produce a result in sustaining and carrying a load which neither before had. Also, the case of the combination of the front axle-tree of a carriage and its two wheels, with the back axle-tree and its two wheels, by a reach or running gear; the four wheels and their axles will have a function, in sustaining and carrying a load, which neither pair of wheels had before. Also, as in case of a combination of a water vessel with a stove; because, in such a combination, the parts, combined by their joint operation, will do what neither alone would do—that is, heat water,—and produce a result which neither alone would produce, and which is the fruit of the combination. To constitute a patentable combination of parts of an apparatus or a machine, the parts must not only be connected, directly or indirectly, but must co-operate with each other, in the production of the final object. The action of the parts producing such co-operation, need not be simultaneous. On the contrary, such action of the parts may be successive, and yet co-operate with each other, in accomplishing the object of the combination. Such is the case, in a reaping-machine, where a reel draws the standing grain to the cutters, the cutter then cuts it, the platform receives it, and the rake removes it from the platform. The operation of these parts upon such quantity of straws as the cutter cuts at one stroke is successive, but all these parts have a joint operation, and co-operate with each other, in carrying on the work of the machine.

So, also, with a mill for grinding grain, in which a hopper holds the grain and delivers it to the grinders, and the grinders grind it. The action of the hopper and the grinders, on small parcels of the grain, is successive, but the parts co-operate with each other, in carrying on the work of the mill.

So also with a seed-sower, in which one part holds and delivers the seed, another part opens a drill in the ground, and another part covers the seed in the drill. With respect to one seed, the action of these parts is successive; but they co-operate with each other, in attaining the object of the machine.

So also in a sewing-machine, where one part advances the cloth to be sewed, and another part forms the stitches. The action of these parts, with reference to a single stitch, is successive; but they co-operate with each other, and in reference to carrying on continuous sewing, their action is simultaneous.

So also in a saw-mill, in which one part advances the wood intermittently, to be sawed; and the saw saws it. With reference to a particular space, the action of these parts is successive; but they co-operate with each other, and in reference to sawing through a whole log, their action is simultaneous.

In all these cases, the parts are in patentable combination, because they are not only connected, but have reciprocal action, and co-operate with each other in accomplishing the object of the machine.

SECOND,

The patent to Lipman is invalid, because it is for only a change of material.

Rubber in one end of a case was known and used as an eraser. Lead in both ends of the same kind of case was known and used. All that was necessary to produce what Lipman claims, was to take the lead out of one end of the

case and put a piece of rubber in its place. There was no discovery of any property of the lead, or of the rubber, or of the case, or of the manner of combining either the lead or the rubber with the case; those were all well known. As a matter of change of material, the alleged improvement consisted in putting rubber into one end of a case where lead was in the other end, just as the rubber had been put into other cases of the same kind. By taking a piece of lead out of the hole and putting a piece of rubber into the hole, the thing was done.

There was known, and in use, an instrument consisting of a pencil case, having lead in one end and rubber in a metallic tube at the other end.

Placing the rubber into a wooden receptacle, instead of a metallic receptacle, was merely a change of the material of the holder at one end, and did not change the function or mode of operation of the instrument. The lead and the rubber were combined by a common handle; so that both the combination of the lead and the rubber, by one handle, was known; and also, both modes of combining the rubber with the handle—that is, by putting it into a hole in a metal end, and by putting it into a hole in a wooden end. All that was necessary to be done, to make the change which Lipman claims, was to attach the rubber to the wooden end, opposite the lead end, just as the rubber had previously been attached to a wooden end, instead of attaching the metallic tube, containing the rubber, to the wooden end. The change was made by slipping the metallic tube off the end of the case, and inserting into the end of the case, a piece of rubber, just the same, in all respects, as it had before been inserted into such a case.

A wooden pencil case, with rubber in one end, and nothing in the other, was known and in use as an eraser; a wooden pencil case, with lead in one end and rubber in the other, set in a metallic tube, was known and in use, both as a marker and an eraser. All that was necessary to constitute the article made by Lipman, was to insert the end of the former into the tube of the latter, without any change of function or property of either part.

It is admitted that a wooden pencil case having a pencil in one end, and rubber in a tube of different material in another end, was known and in use. It is admitted and contended, that a wooden pencil case, having lead in one end and rubber inserted in a tube, of different material in the other end, is included in the Lipman patent.

The two articles are identical in form and function, the only difference contended for being that the tube in one case is made of metal, and in the other it is made of softer material. This is only a change of material. It is said that the case being a softer material, it is susceptible of being cut away; but iron is also susceptible of being cut away. The difference in this susceptibility is a mere matter of degree, and depends upon the kind of tool used to cut it.

The patent of Lipman is for a structure, which consists of a combination. As structures, the old article, with a metallic tube, is the same in all respects as the Lipman article, with the paper tube. The form and function of each corresponding element is exactly the same. The manner of combining them is exactly the same, and the function and manner of use of the combination are exactly the same. A susceptibility of one of the parts being cut away, has nothing to do with the structure, its mode of operation, or manner of use. As well might one claim an axe of softer material than those in common use, combined with the handle, or a handle of softer or harder material than those in common use, combined with the axe.

Where the patent is for a structure consisting of a combination of parts, a change of material in one of the parts differing only in its capability, of being more easily sharpened, or reduced, or detached, has nothing to do with the subject matter of the patent; and where the combination is found to have been old, with the single exception that one of the parts in the old was harder or softer, the patent is invalid.

The law, respecting change of material is sufficiently stated in the last edition of Curtis, on Patents, section 72, where, at section 72 *b*, it is said, "the true test would seem to be that of invention." How can it be said that merely

putting the end of the handle of the old eraser into the metallic tube of the old combined marker and eraser, constituted invention? At section 72 *c*, it is said, "In *Rushton* v. *Crawley*, it was held that the use of a new material, to produce a known article, could not be the subject of a patent, unless some invention were displayed in the adaptation."

Reference for *Rushton* v. *Crawley* is made to 10 Eq. Cas. 522, of the English Law Reports for 1870.

III.

The patent to Reckendorfer is invalid, because what is claimed therein required no invention and is not patentable subject matter.

Necessity made obvious and demanded all that is described in the Reckendorfer patent.

Judge Nelson, in *Tatham* vs. *Le Roy*, 2 *Blatch.*, 487, said:

"Any change or alteration which is suggested to the skillful operator from the working of the machine, and in the course of its operation any useful change that may be the result of the practical working of the machine, is clearly a change that belongs not to the operator, but to the original inventor of the improvement."

If one desire to connect two pieces of timber together by inserting one through a hole to be made in the other, and the latter is too small to contain a hole large enough to receive the former, necessity dictates having the former larger, and there is no room for discovery, invention, or skill, in such a case.

With the Lipman pencil known, there was no more invention in making one end larger, so as to receive a larger

piece of rubber, than there would be in enlarging a hole found to be too small to receive a plug intended for it.

The patentee says:

"Pencils of equal size throughout have been heretofore made with a slip of rubber fitted in, in place of the lead, at one end, but such pencils have not become of any considerable practical importance in consequence of the smallness of the rubber, and it has been held impracticable to make the rubber larger without too much weakening the wood, or making the entire pencil thick and awkward to handle."

Here the patentee explains the old state of things, as he found it, and the difficulty existing therein.

It was, as he says, simply this. In the instrument in use, the piece of rubber in the case was smaller than desirable.

The pretended trouble consisted of two items. One was the want of having the piece of rubber larger, the other was the danger of weakening the case, if the hole for the rubber was made larger, without making the case larger. The state of things was simply that of the most common occurrence; it was the same as where a man wishes to put a bolt through a stick, and the stick which he has is too small to admit of the hole being large enough for the bolt without too much weakening the stick, and the man procures a larger stick. Is that a patentable invention?

The realization that a larger piece of rubber than a pencil case of the ordinary size then in use would receive without too much weakening the case, rendered an enlargement of the case necessary and absolutely demanded it; there was no discovery and nothing to discover or invent about it. No knowledge was required in such case, except such as has been universal ever since men have known that if an enlargement of the hole would too much weaken the stick, a larger stick should be obtained. It was as plain a case as could exist, where to have a larger hole through a stick than the size of the stick will admit of, the stick must be larger.

But, say the complainant's counsel, Reckendorfer not only

made the stick larger, but he made it larger at one end than at the other. Well, after the want of a larger piece of rubber had rendered it obvious that a larger stick must be used to hold it, and the demand having been met by enlarging the stick, and it then being found that the stick was so large as to be, as the patentee says, "awkward to handle," to make it smaller at the end where it was to be handled was the obvious remedy, and it being too large to handle suggested the remedy. If a ball club, at the place where it is held is too large to be conveniently handled, it does not require invention to make it smaller.

But, say the complainant's counsel, Reckendorfer not only made the stick larger at one end than at the other, but he did it by tapering the stick. The answer to this is, that the most obvious way of making one end of the stick smaller than the other is, by tapering it. This is the uniform way of whittling off a stick where one end is to be larger than the other; to do it in any other way, unless there was some special demand for some other way, would be unnatural.

The Reckendorfer patent therefore contains no patentable invention. The things which it describes were obvious to any one.

1st. The want of having the rubber larger rendered it obvious that the case must be larger.

2d. Finding the case too large where it was held by the hand to be convenient, rendered it obvious that the case should then be made smaller.

3d. Tapering it to make it smaller at that place was the most natural and obvious way of doing it.

Invention requires something more than mechanical skill, but there was nothing done by Reckendorfer which required even mechanical skill. When a larger hole was required for the rubber, did it require even mechanical skill to make the case large enough to receive the hole? When it was found that the stick so enlarged was so large where it was to be handled, as to be inconvenient, did it require even mechanical skill to reduce its size at that place?

When it became for convenience desirable to reduce the size of one end of the case and not the size of the other end

did it require invention to do it, nay did it require even mechanical skill to do it and to do it in the most natural way known, that is by tapering it?

The patent to Reckendorfer is void, because it is merely for a second or a new use of an old thing. Pen handles of exactly the same form as the Reckendorfer pencil handle, were known and in common use. The change claimed to have been made by Reckendorfer, was simply using the old pen handle as a handle for the lead and rubber.

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